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1. 2. 3. 4. 5.

No. 11057

2414

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

IMPORTED LIQUORS COMPANY, a partnership.

Appellant,

vs.

LOS ANGELES LIQUOR COMPANY, INC., a corporation,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

JUL 5 - 1945

PAUL P. O'BRIEN,
CLERK

No. 11057

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

EZRA Z. SHAPIRO

S. K. WALZER

540 Guardian Building

Cleveland, Ohio

and

BENJAMIN, LIEBERMAN & ELMORE

1009 Commercial Exchange Bldg.

416 West Eighth Street

Los Angeles 14, Calif.

For Appellee:

BEHRSTOCK & RUDNICK

215 West Seventh Street

Los Angeles 14, Calif. [1*]

In the District Court of the United States for the
Southern District of California
Central Division

No. 3891-PH

IMPORTED LIQUORS COMPANY, a partnership,
888 Union Commerce Building, Cleveland, Ohio,
Plaintiff,

vs.

LOS ANGELES LIQUOR COMPANY, INC., a corporation,
3315 East Vernon Avenue, Los Angeles, California,
Defendant.

COMPLAINT.

I.

Imported Liquors Company is a partnership engaged in the importing and selling of brandy, gin, rum and other liquors to the wholesale trade. Said partnership consists of two partners, namely Howard S. Bernon and Ruth B. Bernon, both of whom are citizens of the State of Ohio.

The Defendant is a corporation organized and existing under and by virtue of the laws of the State of California.

II.

The amount in controversy, exclusive of interest and costs, exceeds the sum of \$3,000.00. [2]

III.

One June 12, 1944, the Defendant, by its non-cancelable order, agreed in writing to purchase from the Plaintiff and, by its acceptance of said order, the Plaintiff sold to the Defendant fourteen hundred (1400) cases of Portuguese Suarez Brandy. upon the following terms: Ship-

ment to be made F.O.B. Atlantic Port, the Defendant to pay for said merchandise upon draft, attached to the bills of lading, at the purchase price of Forty-one Dollars and Fifty-five Cents (\$41.55) per case, less reserve for Internal Revenue Taxes and Customs Duty, at the rate of Twenty-Seven Dollars and Sixty-three Cents (\$27.63) per case, payable by the Defendant, or at a net purchase price of Thirteen Dollars and Ninety-two Cents (\$13.92) per case. As further consideration in and for said agreement of purchase and sale the Defendant issued and delivered to the Plaintiff its check in the sum of Fourteen Hundred Dollars (\$1400.00) as a deposit thereunder.

IV.

On June 14, 1944, Plaintiff received a telegram from the Defendant whereby the latter sought to cancel the aforesaid agreement. Plaintiff forthwith advised the Defendant that it would not accept, nor consent to, cancellation of said agreement. Plaintiff further states that when it presented the aforesaid check for Fourteen Hundred Dollars (\$1400.00) for payment, it was advised by the drawee therein named, that payment and acceptance of said check had been ordered stopped by the defendant, and said drawee refused to honor or accept said check for payment.

V.

Plaintiff states that it has made available, has segregated and stored in a public warehouse under warehouse receipts all of the said merchandise purchased by the Defendant, and that the Plaintiff at all times herein mentioned was and now is ready, willing and able [3] to arrange for the shipment of the said merchandise to the Defendant, or to deliver to the Defendant the said warehouse receipts,

duly endorsed and assigned, and to perform its obligations under the aforesaid agreement, and has so notified the Defendant, but the Defendant at all times herein referred to has failed and refused to perform and fulfill its obligations under its said agreement with the Plaintiff.

VI.

Plaintiff alleges that it is entitled to a judgment against the Defendant for the amount of the purchase price under the aforesaid agreement in the sum of Nineteen Thousand Four Hundred Eighty-Eight Dollars (\$19,488.00) and, in addition thereto, for all expenses incurred in the warehousing, storing and handling of said fourteen hundred (1400) cases of Suarez Brandy from June 12, 1944 until payment therefor by the Defendant, as agreed. Plaintiff states that in connection with the aforesaid fourteen hundred (1400) cases of brandy it has incurred and continues to incur, for and on behalf of the Defendant, reasonable warehousing, storing and handling charges at the rate of six cents (6¢) per case for the first month, and two and one-half cents (2½¢) per case for each month or fraction thereof, thereafter.

VII.

Plaintiff states, in the alternative, that if this Honorable Court should determine that it is not entitled to the relief requested under Paragraph VI hereof, it is entitled to judgment against the Defendant for the damages suffered by the Plaintiff as a result of the Defendant's breach of contract, all as aforesaid. Plaintiff states that the aforesaid fourteen hundred (1400) cases of Suarez Brandy are not now marketable and salable at the net price which the Defendant contracted to pay therefor, namely, Thirteen Dollars and Ninety-two Cents (\$13.92) per case. Plaintiff states that the [4] present reasonable

net market value of said brandy is Five Dollars (\$5.00) per case. By reason of all of the foregoing, this Plaintiff has been caused to suffer damages in the sum of Twelve Thousand Four Hundred Eighty-Eight Dollars (\$12,488.00) and in addition thereto a sum equal to the reasonable warehousing, storing and handling charges, as aforesaid.

Wherefore, Plaintiff prays that (1) the Defendant be required to perform its aforesaid agreement and, simultaneously with the Plaintiff's delivery unto the Defendant of the warehouse certificates covering the aforesaid fourteen hundred (1400) cases of Suarez Brandy, to pay unto the Plaintiff the sum of Nineteen Thousand Four Hundred Eighty-Eight Dollars (\$19,488.00), plus a sum equal to the warehousing, storing and handling charges as hereinabove set forth; or (2) in the alternative, that Plaintiff have judgment against the Defendant in the sum of Twelve Thousand Four Hundred Eighty-eight Dollars (\$12,488.00), plus a sum equal to the warehousing, storing and handling charges, as aforesaid, as damages sustained by the Plaintiff by virtue of the Defendant's aforesaid breach of contract; and (3) that the Plaintiff have judgment against the Defendant for the appropriate amount of interest at the rate of six per cent (6%) per annum from June 12, 1944 in connection with either item 1 or item 2 of the within prayer; and (4) that the costs of this action be taxed against the Defendant.

EZRA Z. SHAPIRO and S. K. WALZER
and

BENJAMIN, LIEBERMAN & ELMORE,

By Aaron Elmore

Attorneys for Plaintiff.

[Endorsed]: Filed Sep. 22, 1944. [5]

[Title of District Court and Cause.]

ANSWER

Comes now the Los Angeles Liquor Company, Inc., a corporation, and answering plaintiff's complaint, admits, denies and alleges as follows:

I.

Answering paragraph I, defendant has no information or belief concerning the allegations contained in the first paragraph of paragraph I, and basing its answer upon such lack of information and belief, generally and specifically denies each and every allegation contained therein.

II.

Generally and specifically denies each and every allegation contained in paragraph III of plaintiff's complaint. [6] and in that connection alleges that defendant never executed any non-cancelable order, and that plaintiff never accepted any order executed by defendant, and further alleges that no agreement was ever entered into between the plaintiff and defendant, except that this defendant did make an offer to purchase certain brandy from plaintiff and mailed a check in the sum of \$1400.00 to the plaintiff, together with said offer.

III.

Answering paragraph IV of plaintiff's complaint the defendant generally and specifically denies each and every allegation contained therein, except that defendant alleges that on June 14, 1944 defendant canceled the offer above mentioned, and stopped payment on the aforesaid check of \$1400.00.

IV.

Answering paragraph V of plaintiff's complaint, the defendant generally and specifically denies each and every

allegation contained therein, and in that connection alleges that there was no agreement between the parties hereto.

V.

Answering paragraph VI of plaintiff's complaint the defendant generally and specifically denies each and every allegation contained therein, and in that connection denies that the plaintiff is entitled to a judgment in the sum of \$19,488.00, or any other sum, or at all; and further denies that plaintiff has incurred any expense of any nature on behalf of this defendant.

VI.

Answering paragraph VII of plaintiff's complaint the defendant generally and specifically denies each and every allegation therein contained, and further denies that the [7] plaintiff has been damaged in the sum of \$12,488.00, or any other sum, by reason of any acts of this defendant.

VII.

As a further defense to the complaint defendant alleges that said complaint fails to state a claim upon which relief can be granted.

Wherefore, defendant prays for judgment against the plaintiff; that plaintiff take nothing by its complaint, and that said complaint be dismissed; that defendant have judgment against plaintiff; for costs of suit incurred in this action; and for such other and further relief as to the Court seems just.

BEHRSTOCK & RUDNICK

By Ben H. Rudnick

Attorneys for Defendant

[Title of District Court and Cause.]

INTERROGATORIES TO DEFENDANT UNDER
RULE 33

To the defendant and to Behrstock & Rudnick, Esqs., its attorneys:

Plaintiff requests the defendant corporation, or some officer competent to testify in its behalf, to answer in writing, under oath, within the time allowed by law the following interrogatories under Rule 33 of the Rules of Civil Procedure for the District Court of the United States: [9]

1. State the connection, if any, of Irven Rose to Los Angeles Liquor Company, Inc., a corporation, defendant, on June 12, 1944, and include in the answer his connection, if any, as officer, director, stockholder and as employee.

2. State the connection, if any, of Irven Rose to Los Angeles Liquor Company, Inc., a corporation, defendant, on June 13, 1944, and include in the answer his connection, if any, as officer, director, stockholder and as employee.

3. State the connection, if any, of Irven Rose to Los Angeles Liquor Company, Inc., a corporation, defendant, on June 14, 1944, and include in the answer his connection, if any, as officer, director, stockholder and as employee.

4. State his duties on or about June 12, 1944.

5. Was Mr. Irven Rose authorized to make purchases of liquor on behalf of the corporation on June 12, 1944?

6. Was Mr. Irven Rose authorized by the corporation, either expressly or impliedly, by virtue of his connection

with the corporation to sign the purchase order dated June 12, 1944, a copy of which is attached hereto, marked "Exhibit A"?

7. Was Mr. Irven Rose authorized by the corporation to sign the corporation's check No. 6565, a copy of which is attached hereto and marked "Exhibit B"?

8. Did the corporation, or anyone connected with it, receive the letter from Imported Liquors Company, dated June 5, 1944 in the regular course of mail after June 5, 1944, a copy of which letter is attached hereto, marked "Exhibit C"?

9. Was the letter mentioned in question No. 8 referred to Aaron Lilien or Irven Rose for attention?

10. If so, to whom?

11. Was there any reason for endeavoring to cancel the purchase order dated June 12, 1944 (Exhibit A) by the telegram dated June 14, 1944, a copy of which is attached hereto, marked [10] "Exhibit D", other than the reasons there set forth, to wit: "Irven Rose . . . sold his interest in Los Angeles Liquor Company?"

12. If so, what was such other reason or reasons?

Dated: November 24, 1944.

EZRA Z. SHAPIRO and S. K. WALZER

and

BENJAMIN, LIEBERMAN & ELMORE,

By Aaron Elmore

Attorneys for Plaintiff.

[Note: Exhibit A is the same as Exhibit A to deposition of Howard S. Bernon which will be found at page 54 so is not repeated at this point.]

[Note: Exhibit B is the same as Exhibit B to deposition of Howard S. Bernon which will be found at page 55 so is not repeated at this point.]

[Note: Exhibit C is the same as Exhibit C to deposition of Howard S. Bernon which will be found at page 57 so is not repeated at this point.]

[Note: Exhibit D is the same as Exhibit D to deposition of Howard S. Bernon which will be found at page 58 so is not repeated at this point.]

Received copy of the within Interrogatories and also Notice of Taking Deposition this 27th day of Nov. 1944. Ben H. Rudnick, Attorneys for Defendant.

[Endorsed]: Filed Jan. 15, 1945. [11]

[Title of District Court and Cause.]

ANSWERS TO INTERROGATORIES PRESENTED
BY PLAINTIFF UNDER RULE 33

State of California
County of Los Angeles—ss:

Aaron Lilien, being first duly sworn, deposes and says: That he is the President of defendant Corporation, and herewith answers the Interrogatories propounded by plaintiff under Rule 33. That said answers are true and correct of his own knowledge. That the numbers below

set forth are the numbers of the Interrogatories, which are immediately followed by the answer:

- 1—Stockholder and Secretary.
- 2—Stockholder and Secretary.
- 3—Stockholder and Secretary. [16]
- 4—Charge of Sales.
- 5—Yes.
- 6—Yes.
- 7—Yes.
- 8—Yes.
- 9—Yes.
- 10—Both.
- 11—Yes.

12—There was still some doubt in our minds whether there would not be some trouble about passing the Brandy with the California authorities, and I decided that it was too much Brandy to order, in view of the fact that Mr. Rose was leaving the Company.

AARON LILIEN

Subscribed and sworn to before me this 8th day of December, 1944.

(Seal)

BEN H. RUDNICK

Notary Public in and for the County of Los Angeles,
State of California. [17]

[Endorsed]: Filed Jan. 15, 1945. [18]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR SUMMARY
JUDGMENT

To the Plaintiff, and to Ezra Z. Shapiro and S. K. Walzer, and Benjamin, Lieberman & Elmore, Plaintiff's Attorneys:

You and each of you will please take notice that on Monday the 22nd day of January, 1945 at the hour of 10:00 o'clock A. M., or as soon thereafter as counsel can be heard, in the court room of the Honorable Pierson M. Hall, in the Federal Building at Temple & Spring Streets, Los Angeles, California, the defendant will move the Court for a summary judgment in the above entitled action.

Said motion will be made on the grounds set forth in the Statement of Grounds and Points and [19] Authorities attached hereto, and will be based upon the affidavits of Irven Rose, Aaron Lilien and M. D. Weiner which affidavits are also attached hereto; and will further be based upon the papers and documents in the file of the above entitled case.

Dated this 10th day of January, 1945.

BEHRSTOCK & RUDNICK

By Ben H. Rudnick

Attorneys for Defendant [20]

[Title of District Court and Cause.]

STATEMENT OF GROUNDS AND POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT

Defendant's purchase order of June 12, 1944, upon which the complaint in this case is based, was subject to acceptance by plaintiff. This was the understanding between the defendant and plaintiff's agent, and also the general custom and usage in the liquor trade as appears by affidavits filed herewith. This was also the plaintiff's understanding of the transaction as appears on page 2, lines 2 and 3 of the complaint, to-wit, "and by its acceptance of said order the plaintiff sold to the defendant", etc.

The order, therefore, was merely an offer which would become a binding agreement only when accepted by the offeree (plaintiff) and the acceptance communicated or put in the [21] course of communication to the offeror (defendant).

Plaintiff received defendant's telegram canceling the order on June 14, 1944 (page 2, line 18 of complaint) and this was before any acceptance was communicated or put in the course of communication to defendant by plaintiff.

Therefore, as a matter of law, there never was a completed agreement of purchase and sale between the parties and plaintiff has no cause of action.

Points and Authorities.

1—An order for goods or chattels is merely an offer to buy and not a contract to sell or purchase.

H. D. Taylor & Co. -vs- Jonas, 118 CA 208—4
P 2nd, 497

Harvey -vs- Duffy, 99 Cal. 401—33 P. 897

Durant-Dort Carriage Co. -vs- Karth, 14 Oh Circ.
Ct. NS 341, 33 Oh Circ Ct. 343.

55 C. J. 81 (Sales Sec. 45)

6 Cal. Jur. 52

46 Amer. Juris, 245

2—An order or offer is revocable at any time before acceptance or approval is communicated to the proposed buyer or offeror.

Calif. Civil Code, Sec. 1586

Harvey -vs- Duffy (supra)

Durant-Dort Carriage Co. -vs- Karth (supra)

6 Cal. Jur. 51

9 Ohio Juris 261

Baird, et al. -vs- Pratt, et al., 148 Fed. 825.

BEHRSTOCK & RUDNICK

By Ben H. Rudnick

Attorneys for Defendant [22]

[Title of District Court and Cause.]

AFFIDAVIT OF IRVEN ROSE IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

State of California

County of Los Angeles—ss:

Irven Rose, being first duly sworn, deposes and says: That the following facts are within his personal knowledge, and if he is called as a witness in the above entitled action he can and will testify competently thereto.

That on June 12, 1944 he was a stockholder and secretary, and in charge of sales of Los Angeles Liquor Company, Inc., a corporation, and defendant herein.

That he has been engaged on the wholesale trade of wines, beers and liquors in the State of California for the past ten years. That it has always been the custom and usage in said trade that any and all orders [23] for wines, beers and liquors should be in writing, signed by the buyer and subject to acceptance by the seller, either by written confirmation or by actual shipment of the merchandise.

That on the evening of June 12th, 1944 affiant signed the written order referred to in plaintiff's complaint on behalf of the defendant. That a true and correct copy of said order is attached hereto, marked "Exhibit A". That at the same time he also signed a deposit check in the sum of \$1400.00 in connection with said order. That he then handed said order to M. D. Weiner, agent of

the plaintiff, for transmittal to plaintiff. That affiant was then advised by said M. D. Weiner that shipment would probably be expected when his principal confirmed the order and receipt of the deposit check.

That said M. D. Weiner has never been employed by the Los Angeles Liquor Company either as agent, or employee and has never been authorized by the Los Angeles Liquor Company to make any commitments or sign any documents on its behalf.

That affiant knows of his own knowledge that no confirmation of said order was ever received from plaintiff either on June 14, 1944 or any date prior thereto, and that no communication confirming said order and post dated June 14, 1944, or any date prior thereto was ever received by defendant corporation.

That affiant is no longer connected with defendant corporation in any way.

IRVEN ROSE

Affiant

Subscribed and sworn to before me this 10th day of January, 1945.

(Seal)

BEN H. RUDNICK

Notary Public in and for said County and State [24]

[Note: Exhibit A is the same as Exhibit A to the deposition of Howard S. Bernon which will be found at page 54 so is not repeated at this point]

[Title of District Court and Cause.]

AFFIDAVIT OF AARON LILIEN IN SUPPORT
OF MOTION FOR SUMMARY JUDGMENT

State of California

County of Los Angeles—ss:

Aaron Lilien being first duly sworn deposes and says:
That the following facts are within his personal knowledge, and if he is called as a witness in the above entitled action he can and will competently testify thereto:

That he is President of defendant Los Angeles Liquor Co., Inc., a corporation. That he has been engaged in the wholesale trade of wines, beers and liquors for the past five or six years. That he participated in the negotiations for the order involved in this case with M. D. Weiner, agent of plaintiff. That he was advised by said agent that any order for plaintiff's merchandise was to be executed in writ- [26] ing and submitted to plaintiff for approval and acceptance. That it is the general custom and usage in the liquor trade that all orders should be in writing, signed by the buyer and subject to acceptance by the seller, either by written confirmation or actual shipment;

That in the morning or noon of June 14, 1944 affiant advised Mr. Weiner that he desired to cancel the order of June 12, 1944 because Mr. Irven Rose, who was then an officer, stockholder and sales manager of defendant corporation was severing his connections with the corporation and also because affiant was worried about the

brandy passing California authorities. That Mr. Weiner advised affiant to wire in his cancelation to the Company before the order was confirmed. That affiant did immediately telegraph a cancelation of the order to the Company, and stopped payment of the deposit check. That a true copy of said cancelation wire is attached hereto, marked "Exhibit A";

That defendant corporation did not receive any notice of acceptance of said order on June 14th, 1944 or any day prior thereto, and did not thereafter receive any written notice of acceptance of said order either dated or postmarked on June 14, 1944 or any day prior thereto;

That M. D. Weiner has never been employed by defendant corporation as agent, servant or employee; and never had any authority, written or otherwise, to make any commitments on behalf of defendant corporation.

AARON LILIEN

Affiant

Subscribed and sworn to before me this 10th day of January, 1945.

(Seal)

BEN H. RUDNICK

Notary Public in and for said County and State [27]

[Note: Exhibit A is the same as Exhibit D to deposition of Howard S. Bernon which will be found at page 58 so is not repeated at this point.]

[Title of District Court and Cause.]

AFFIDAVIT OF M. D. WEINER IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

State of California

County of Los Angeles—ss:

M. D. Weiner being first duly sworn, deposes and says: That the following facts are within his personal knowledge, and if called as a witness on the trial of this action he can and will competently testify thereto.

That affiant has been a sales agent of imported wines, brandies and liquors for various companies for a period of approximately ten years in various states of the United States, including the State of California. That he was the sales agent for the plaintiff in connection with the transaction involved herein. That he took the purchase order, a copy of which is attached hereto marked "Exhibit [29] A", from defendant on behalf of the plaintiff for the purpose of transmitting the same to the plaintiff.

That affiant advised the defendant that said purchase order was subject to acceptance by the plaintiff upon plaintiff's receipt of a properly executed order in writing accompanied by a deposit check. It has always been the custom and usage in the liquor trade in California and in other states, that all orders taken by a salesman are subject to acceptance by the principal either by written confirmation or by actual shipment of the merchandise, and all of affiant's dealings with defendant in connection with this transaction and all other transactions has been on that basis.

That affiant has had other dealings with defendant in the purchase and sale of liquors, but has never been employed by defendant either as agent, servant or employee, and has never had any authority to make any commitments or sign any documents on behalf of the defendant.

That affiant affixed his name to the above mentioned purchase order after he had received it from defendant and only for the purpose of identifying himself with the order on plaintiff's records as the salesman who sent it in. That all communications between this affiant and plaintiff were carried on by affiant as plaintiff's salesman, and without the consent or knowledge of defendant.

That on June 14, 1944 Mr. Lilien, who represents the defendant corporation, advised affiant that he desired to cancel aforementioned order. That affiant advised Mr. Lilien to wire his cancelation to plaintiff before plaintiff confirmed the order, because affiant had no authority to bind his principal either in taking the order or the cancelation.

M. D. WEINER

, Affiant [30]

Subscribed and sworn to before me this 10th day of January, 1945.

(Seal)

BEN H. RUDNICK

Notary Public in and for the County of Los Angeles,
State of California [31]

[Note: Exhibit A is the same as Exhibit A to the deposition of Howard S. Bernon which will be found at page 54 so is not repeated at this point.]

[Endrosed]: Filed Jan. 12, 1945.

[Title of District Court and Cause.]

NOTICE OF TAKING DEPOSITION

To the Defendant and to Behrstock & Rudnick, Esq., its attorneys:

Please Take Notice that the plaintiff desires to take the deposition of Howard S. Bernon, one of the partners of the plaintiff herein upon oral examination under the provisions of Rule 30 of the Rules of Civil Procedure for the District Court of the United States, and the deposition of said witness will be taken on Wednesday, December 20, 1944, at 3:00 o'clock P. M. of said day, at the office of Ezra Z. Shapiro and S. K. Walzer, 540 Guardian Building, Cleveland, Ohio, before a Notary Public. [34]

The address of said Howard S. Bernon is 888 Union Commerce Building, Cleveland, Ohio.

You will further take notice that the Notice of Taking Deposition on Friday, December 8, 1944 of said witness is hereby withdrawn, and this notice is substituted therefor.

Dated: December 5, 1944.

EZRA Z. SHAPIRO and
S. K. WALZER

and

BENJAMIN, LIEBERMAN & ELMORE,
by Aaron Elmore
Attorneys for Plaintiff.

Received copy of the within notice this 5th day of December, 1944. Ben H. Rudnick, Attorney for Defendant. [35]

[Title of District Court and Cause.]

Deposition of Howard S. Bernon, taken before me, the undersigned, Harry Herman, a Notary Public in and for the State of Ohio, on Tuesday, the 19th day of December, 1944, beginning at 4:00 o'clock p. m., in the offices of E. Z. Shapiro and S. K. Walzer, 540 Guardian Building, Cleveland, Ohio, pursuant to the annexed notice and stipulations of counsel for the respective parties herein; said deposition to be read in evidence on behalf of the Plaintiff, upon the trial of the above entitled cause. [36]

Appearances:

On behalf of the Plaintiff:

Samuel K. Walzer, Esq., of Cleveland, Ohio.

On behalf of the Defendant:

Morton S. Zaller, Esq., Leader Building, Cleveland, Ohio.

Stipulations

It is stipulated and agreed by and between counsel for the respective parties herein, that this deposition may be taken in shorthand by Harry Herman, a shorthand reporter, and by him transcribed into typewritten manuscript in the absence of the witness.

Mr. Walzer: Let the record show that counsel for the defendant has agreed to stipulate to the taking of the within deposition on December 19th, 1944, at 4:00 o'clock p.m., instead of on December 20th, 1944, at 3:00 o'clock p.m., as set forth in the original notice attached hereto.

Mr. Zaller: I am waiving the date and time specifically and to the method of taking it. There cannot be an objection, because you served a notice in accordance with the law. We were represented by counsel.

The defendant reserves the right to object [37] to the relevancy and materiality and competency of any of the evidence offered at the taking of this deposition, in addition to any objection that may be made during the taking of the deposition.

HOWARD S. BERNON,

of lawful age, being by me first duly sworn, as hereinafter certified, deposes and says as follows:

Direct Examination

of Howard S. Bernon by Mr. Walzer:

Q. What is your name? A. Howard S. Bernon.

Q. And your address?

A. Hotel Carter, Cleveland, Ohio.

Q. What is your occupation, Mr. Bernon?

A. Managing partner of Imported Liquors Company.

Q. What is the Imported Liquors Company?

A. Imported Liquors Company is a concern which imports liquors from various countries and sells them at wholesale to jobbers and to monopoly states in the United States.

Q. Who are the members of this partnership?

A. Myself and Mrs. Ruth B. Bernon.

Q. Ruth B. Bernon is your wife? [38]

A. Yes.

Q. Is she a resident of Ohio?

A. She also resides at the Hotel Carter.

Q. In Cleveland, Ohio? A. Cleveland, Ohio.

Q. What is your office address?

A. 888 Union Commerce Building, Cleveland, Ohio.

Q. How long have you been in the liquor business, Mr. Bernon?

A. In the liquor business since 1934.

(Deposition of Howard S. Bernon)

Q. Please tell us what your experience has been in this business?

A. From 1934, when repeal came back I entered into business with a concern which operated under the name of the Distillers Brewers Products Corporation in Jersey City. I worked for them in their plant and in their business, various departments, shipping department. In fact, in about every capacity. Then I was transferred to New York City. I worked in the New York City sales office. I was then transferred to Ohio, where I was assistant Ohio sales manager for that concern. In 1935 I left them and organized the Howard Bernon Company, which was a company engaged in representing various distillers and importers in the State of Ohio.

Q. Is that a corporation?

A. It was an Ohio corporation. Howard Bernon Company also [39] imported various wines. We represented such concerns as 21 Brands, Inc., F. C. G. Importers, Inc., Jacquin Cordial Company, Fairfax Distillery Company, Kolmar Company, and other companies of that type, besides doing our own trading and importing. I organized the Imported Liquors Company in May, 1942. Since that time I have been the managing partner of that concern. In other words, I have been engaged in the liquor business since repeal. I have been engaged in every phase of the business.

Q. Am I correct in assuming, Mr. Bernon, from 1934 on you were engaged in business as the Howard S. Bernon Company?

A. It was the Howard Bernon Company. No. "S" in it.

(Deposition of Howard S. Bernon)

Q. Have you had occasion to do any traveling in connection with your activities in the liquor business?

A. I went to Europe in 1937 and studied the wine situation over there, visiting all the leading distillers and distributors in France. And since I have been the managing partner of Imported Liquors Company I have made trips to Mexico City.

Q. Are you acquainted with the United States market with reference to liquors, both imported and domestic?

A. I would definitely say yes. I have been in every state in the Union with the exception of two, in the course of my business.

Q. What two were they? [40]

A. North Carolina. Incidentally, that is one we do business in. The other one is Maine.

Q. To whom do you sell your liquor, generally speaking?

A. Wholesalers and state monopolies. We sell ten or eleven of the state monopolies. Some of our merchandise is also sold for consumption in Alaska.

The following exhibits were marked by the Notary.

Plaintiff's Exhibit A, letter dated June 12, 1944.

Plaintiff's Exhibit B, check dated June 12th, 1944, B1 and B2, slips attached thereto.

Plaintiff's Exhibit C, copy of letter dated June 5th, 1944, to the Los Angeles Liquor Company, Inc.

Plaintiff's Exhibit D, telegram dated June 14th, 1944, signed Aaron Lilien.

Plaintiff's Exhibit E, Letter of Los Angeles Liquor Company, Inc., dated May 20th, 1944.

(Deposition of Howard S. Bernon)

Plaintiff's Exhibit F, copy of letter dated June 29th, 1944, from Imported Liquors Company to Los Angeles Liquor Company, Inc.

Plaintiff's Exhibit G, letter dated June 7th, 1944, from M. D. Weiner to Imported Liquors Company.

Plaintiff's Exhibit H, telegram dated June 7th, from M. D. Weiner to Imported Liquors Company.

Plaintiff's Exhibit I, Food & Drug Inspection station, [41] dated May 15, 1944.

Plaintiff's Exhibit J, telegram dated June 5, from M. D. Weiner to Imported Liquors Company.

By Mr. Walzer:

Q. Did you use salesman in the distribution and sale of your merchandise?

A. Salesmen and agents.

Q. Who is Mr. M. D. Weiner?'

A. Mr. M. D. Weiner was for a time an agent of our company, and also an agent of the Los Angeles Liquor Company.

Q. Handing you what has been marked for the purpose of identification Plaintiff's Exhibit E, I will ask you if you received that latter from the Los Angeles Liquor Company? A. I did.

Q. Can you tell us about when you received this letter?

A. I received this letter about May 28th approximately. I was in New York at the time it reached my office, and the copy was forwarded to me in New York.

(Deposition of Howard S. Bernon)

Q. What, if anything, did you do with reference to that letter?

A. Well, first of all I had—I had a long distance 'phone call put in to Mr. Aaron Lilien in Los Angeles, in which I discussed this letter. I told him we had a shipment of brandy of which there originally were 1500 cases, of which there was 1400 left available for sale. That it had been [42] passed by the Food and Drug Administration of the United States Government, and, therefore, could meet all the requirements of his letter of May 20th. I further told him that I could send him a photostat of this, and that it would not be necessary for the merchandise to be reexamined in California by any Federal or State authorities that they had. I then, having hung up the 'phone, had a photostat made and wrote him a letter in which I confirmed our telephone conversation.

Q. Handing you what has been marked Plaintiff's Exhibit C for the purpose of identification, I ask you if that is a true copy of the letter which you addressed to Mr. Aaron Lilien on June 5th, 1944?

A. It absolutely is.

Q. Handing you what has been marked for identification Plaintiff's Exhibit I, I ask you if that is the original of which you sent a photostatic copy to Mr. Aaron Lilien of the Los Angeles Liquor Company, Inc., on June 5th, 1944?

A. It is.

Q. And did that approval cover the brandy which was the subject matter of the conversation with Mr. Lilien?

A. Yes, sir. It is the only lot of brandy we discussed.

(Deposition of Howard S. Bernon)

Q. Handing you what has been marked for identification Plaintiff's Exhibit G, I will ask you if you received [43] that letter from Mr. M. D. Weiner?

Mr. Zaller: I will object at this point to the testimony regarding the letter and the introduction of the letter as an exhibit.

Q. Answer the question.

A. I received this letter from Mr. Weiner.

Q. Handing you what has been marked for the purposes of identification Plaintiff's Exhibit H, a wire from M. D. Weiner, addressed to Imported Liquors Company, dated June 7th, 1944, I will ask you if you received this wire from Mr. Weiner?

Mr. Zaller: At this point I object to any testimony regarding this exhibit or to the introduction of the exhibit.

A. I did receive it.

Q. Handing you what has been marked for the purposes of identification Plaintiff's Exhibit A, I will ask you if you received this letter from the Los Angeles Liquor Company, Inc., dated June 12th, 1944, and signed by Irven Rose? Did you receive the letter?

A. Yes, sir.

Q. What, if anything, did you do, Mr. Bernon, after receiving Plaintiff's Exhibits G and H—

A. I immediately wired Mr. Weiner asking for shipping instructions. I sent the wire on June 9th. [44]

Q. —to confirm the sale—

Mr. Zaller: Just a minute. I want to object to each question regarding this letter, and may we stipulate that my objection stands as though it were repeated to each question regarding those exhibits. Is that all right?

(Deposition of Howard S. Bernon)

Mr. Walzer: Yes, certainly.

Q. And in this wire which you sent asking for shipping instructions you, of course, confirmed the sale of the brandy to the Los Angeles Liquor Company, Inc?

A. Naturally.

Mr. Zaller: May I have that last question and answer clarified.

(Last question and answer read. Colloquy ensued.)

Q. Did you receive the \$1400 check referred to in Exhibit A? A. Yes, sir.

Q. Handing you what has been marked for the purposes of identification Plaintiff's Exhibit B, I ask you if that is the check in the sum of \$1400 made payable to the Imported Liquors Company, by the Los Angeles Liquor Company, Inc., which you received together with the letter marked Exhibit A?

A. That is the exact check. It is marked "deposit on 1400 cases Suarez Brandy." So I did.

Q. What did you do with this check upon receiving it?

A. I took the—or rather sent the check over to the [45] Manufacturers Trading Corporation, our commercial bankers.

Q. Handing you what has been marked for identification, Plaintiff's Exhibit B-1, I will ask you if your bankers, the Manufacturers Trading Corporation, received a notice from the Central National Bank of Cleveland to the effect that payment had been stopped by the Los Angeles Liquor Company, Inc., on the check identified as Plaintiff's Exhibit B? A. Yes.

Q. Handing you what has been marked for identification as Plaintiff's Exhibit B-2, I ask you if that is the

(Deposition of Howard S. Bernon)

notification which the Bank of America sent to the Central National Bank of Cleveland, advising them of the stop payment order on Plaintiff's Exhibit B?

A. Yes; it is.

Q. Handing you what has been marked for identification, Plaintiff's Exhibit D,—(Exhibit D handed to Mr. Zaller by Mr. Walzer)—and I ask you if you received this wire dated June 14th, 1944, sent by Aaron Lilien of the Los Angeles Liquor Company to the Imported Liquors Company? A. I did.

Q. Which did you receive first, Mr. Bernon, the letter of June 12th, identified as Plaintiff's Exhibit A, or the wire identified as Plaintiff's Exhibit D?

A. I received them both on the same day, but the letter came [46] about three or four hours before the wire. I remember this because it was a confirmation one minute and cancellation the next.

Q. What, if anything, did you do after receiving the wire of cancellation identified as Plaintiff's Exhibit D?

A. We wrote a letter on June 29th, to the attention of Mr. Aaron Lilien, expressing our amazement at his so-called cancellation. We also at that time suggested that he go through with his part of the deal as originally contracted for.

Q. Handing you what has been marked for the purposes of identification, Plaintiff's Exhibit F, I will ask you if that is a true copy of the letter dated June 29th, 1944, which you addressed to the Los Angeles Liquor Company, Inc., attention Mr. Aaron Lilien?

A. It is.

(Deposition of Howard S. Bernon)

Q. Now, Mr. Bernon, you have stated earlier in this deposition that you have had a great deal of experience in the liquor business. Will you tell us what is meant by the so-called expression "liquor holiday"?

Mr. Zaller: At this time I want to object to any testimony by Mr. Bernon as an expert on any subject not concerned with this lawsuit.

Q. Even though you are an expert, would any one in the trade know what is meant by a "liquor holiday," Mr. Bernon? [47]

A. Yes. The "liquor holiday" was merely a holiday granted by the W. P. B., that is the War Production Board, to allow all distillers of the United States to produce spirits for beverage purposes for one month. Whereas for about, oh, around two years they were not permitted to manufacture any spirits except for the United States Government.

Q. What kind of beverages would these spirits produce?

A. To make gin, whiskey. Used to make—to blend neutral spirits with whiskeys.

Q. Would not be used for brandy; would it?

A. No, sir.

Q. About when was the trade made aware of the fact that there was to be such a liquor holiday?

A. June 13th.

Q. Of what year?

A. 1944. There had been talk about it on and off for approximately six weeks prior to that time. There had been a lot of speculation in the papers, such as the New York Journal of Commerce and New York Times; papers of that kind in addition to the trade papers.

(Deposition of Howard S. Bernon)

Q. What was the effect, if any, of the so-called liquor holiday upon the marketability of the type of imported brandy which you had sold to the Los Angeles Liquor Company?

A. Well, naturally it reduced the sales on all imported merchandise, especially brandy. Brandies had been used for [48] the past two years, more or less as a substitute for domestic whiskeys which were not available. While there had always been a certain amount of brandy consumed in the United States, it was an exceedingly heavy supply that the country had used for substitution. Of course, with the coming of domestic whiskeys in the market, it would reduce the sales of brandy.

Q. Would the market value of the brandy drop or increase as the result of the liquor holiday?

A. Decrease.

Mr. Zaller: I want to reiterate my objection to all questions that call for Mr. Bernon testifying as an expert. May we stipulate that?

Mr. Walzer: You certainly may.

Mr. Zaller: That my objection is a continuing one to the successive questions.

Mr. Walzer: Let the record show that certain of the questions which may be propounded by counsel for the plaintiff do not require the opinion of an expert. As to those which do require the opinion of an expert, counsel for the plaintiff states that he has duly qualified Mr. Bernon as an expert in this field.

Q. Now, as a matter of fact, I don't want your opinion, Mr. Bernon. What is the fact as to whether or not the liquor [49] holiday depressed the market value

(Deposition of Howard S. Bernon)

of imported brandies such as you had for sale and sold to the Los Angeles Liquor Company, Inc?

A. It definitely did.

Q. What is the present reasonable market value of such imported brandies? A. Today?

Q. Today.

A. Approximately \$2 per case in bond.

Mr. Zaller: I object to that question.

Q. Is that price net or gross?

A. It is net. That does not include Federal taxes or import duty.

Q. What was the reasonable market value of imported brandy such as was the subject matter of the sale to the Los Angeles Liquor Company on September 22nd, 1944?

A. At that time it was approximately \$5 per case in bond.

Q. And did that or did not that include Federal taxes?

A. It did not. When I say in bond it does not include any Federal taxes or import duties.

Q. Are you prepared to deliver to the Los Angeles Liquor Company 1400 cases of imported brandy, Suarez brandy I believe you call it, which was the subject matter of your agreement with them?

Mr. Zaller: I object.

A. I am. [50]

Mr. Zaller: I object to the question as being too general.

A. I am ready to deliver the brandy to them, and have been ready to deliver it any day since June 5th they desire to receive the merchandise.

Q. Is this brandy segregated? A. Yes, sir.

(Deposition of Howard S. Bernon)

Q. Where is it?

A. In the Rockefeller Center Warehouse, 630, 5th Avenue, New York City.

Q. What is the fact as to whether or not you incurred any warehouse or storing or handling charges with reference to the segregation of the said 1400 cases of Suarez brandy?

A. Well, the warehouse naturally charges warehouse charges. And they have a flat rate which is $3\frac{1}{2}$ cents in and $2\frac{1}{2}$ cents a month thereafter.

Q. What is that, per case, per bottle or what?

A. That is per case.

Q. As I understand it, you mean you have to pay $3\frac{1}{2}$ cents per case when you first store it, and then pay $2\frac{1}{2}$ cents per month per case thereafter?

A. Yes; and including the first month. The $2\frac{1}{2}$ cents charge starts the first month.

Mr. Zaller: $2\frac{1}{2}$ per month?

A. $3\frac{1}{2}$ in, and then $2\frac{1}{2}$ per case every month starting [51] with the first month.

Q. So then the total charges for the first month would be six cents per case, and after that $2\frac{1}{2}$ cents per case per month? A. That's correct.

Q. Has the defendant, the Los Angeles Liquor Company, Inc., at any time, since the receipt of the wire of cancellation by you, offered to accept the 1400 cases of Suarez brandy which it bought from you?

A. They have not.

Q. 1400 cases of Suarez is still in the warehouse?

A. It is.

Mr. Walzer: The plaintiff offers in evidence Plaintiff's Exhibits A, B, B-1, B-2, C, D, E, F, G, H and I.

(Deposition of Howard S. Bernon)

Mr. Zaller. Defendant objects to Exhibits G and H.

Mr. Walzer: It is stipulated that photostats or photostatic copies may be introduced and substituted in place of all exhibits offered by the plaintiff.

You may inquire, sir.[52]

Cross-Examination

of Howard S. Bernon by Mr. Zaller:

Q. Mr. Bernon, you reported or testified that the brandy concerned was segregated in the Rockefeller Center warehouse. Just in which way is it segregated?

A. Well, all merchandise that is in bond is kept in a lot which it comes in, because when you tax pay the Government makes you give them the bond number, the ship number that it came in, the papers, consul invoices, and so on; so you cannot mix up the merchandise.

Q. Well, was this imported as a lot of 1400 cases?

A. As a lot of 1500. There was one hundred cases sold prior to the time that Lilien ordered the merchandise.

Q. And what designation has this lot that is in storage?

A. I don't understand your question.

Q. Well, in what way is it marked or labeled or identified in the warehouse?

A. It is identified by the bond number, and also by your F. S. A. inspection and the ship number. We have just set the merchandise aside.

Q. There is no indication in the way of markings that would show the name of the Los Angeles Liquor Company on that merchandise?

A. To tell the truth I don't know. I don't know whether I was able to stop the markings off some of the cases or [53] not in time.

(Deposition of Howard S. Bernon)

Q. Well, you were talking about the markings on the cases. That means preparatory for shipment?

A. That is correct. I have never gone into the warehouse to check, to see whether they got to the point of putting them on the cases or not.

Q. In whose name is the brandy?

A. Imported Liquors Company.

Q. Do you have other merchandise stored there?

A. Yes, sir.

Q. And any other merchandise is probably in the same part of the warehouse as this merchandise?

A. It is in what they call a bonded section. Each lot of merchandise is kept separate according to the bond numbers and your I. T. entry numbers. We cannot mix them up if we want to. I mean that merchandise that is under bond is actually—partly belongs to the government and partly to us, until we pay the duties and taxes on it.

Q. Do you have any other bonded merchandise at the warehouse? A. Yes, sir.

Q. In that event isn't it likely that this merchandise is mixed up with the other merchandise that is in your name? A. No.

Q. Bonded merchandise?

A. No; the government does not permit you to do that. We have [54] to report to the government the numbers and also the movement on every case of merchandise. Therefore, we have to keep all merchandise segregated. We know, for example, that the lot of 1400 cases of Suarez is there. It is the only lot of one entry number; that is, the 1400 cases of Suarez.

(Deposition of Howard S. Bernon)

Q. Now, to get back to the letter. Now, referring to Plaintiff's Exhibit A. What is the date of that letter?

A. June 12th.

Q. You say you received it on the 14th?

A. Yes, sir.

Q. You remember how that was sent to you?

A. Special delivery air mail. It is marked on the letter too, incidentally.

Q. And the wire is dated what? I am referring to Exhibit D. A. 14th.

Q. You say that the wire arrived subsequent to the letter? A. The letter arrived first.

Q. Now, upon the receipt of the letter did you do anything?

A. Well, the letter was not the order. The letter just merely enclosed the check. That is all that it amounted to. The order, so far as I was concerned, was received on June 7th.

Q. Well, I will repeat my question. Did you do anything after receiving the letter that was dated June 12th? That is [55] Plaintiff's Exhibit A.

A. There was nothing to do, because I had made all arrangements for the shipment two days previously, or rather not two days previously, a week previously.

Q. Well, would you have continued with your preparation and the actual shipment if you had received no letter dated June 12th?

A. If we had not received it we would have shipped them. They gave us a definite order on June 7th.

Q. And when you say you got your definite order on June 7th, you refer to the telegram of June 7th, which

(Deposition of Howard S. Bernon)

was marked Plaintiff's Exhibit H, to which the defendant objected? That is correct?

A. That is correct. The letter only tended to confirm the telegram of the 7th, and also gave us the check. He evidently did not want to telegraph our money. That is not the usual procedure in business.

Q. Now, on June 29th, you wrote to the defendant? Your Plaintiff's Exhibit F. A. Yes.

Q. And inquired the reason for the cancellation. You tell us why you waited from the 14th of June to the 29th to write?

A. If I remember correctly we made some effort through Mr. Weiner to try to get the—their letter of—or rather their wire. I got that wire of June 14th rescinding the [56] order. Also I travel a good deal out of town. I left town there for a few days. Of course, I could not take care of everything.

Q. Is there any one who takes care of your business if anything like that arise?

A. Nobody writes my mail. If I am out of town they wait until I get back.

Q. But if you are out of the city how can some one get in touch with you?

A. Oh, I try to keep in touch with them when I am traveling. I still use the 'phone and wires.

Q. Do you know definitely you were out of town on the 14th, if it is the 14th, until the 29th?

A. I am quite sure I was.

Q. You say you made some effort. You mean you made some effort to see whom?

A. I made some effort to get ahold of Weiner.

(Deposition of Howard S. Bernon)

Q. The defendant?

A. No; I made some effort to get hold of Weiner.

Q. Did you ever reach Weiner?

A. Why, we have other customers. I just can't—I take care of a great many folks. I don't take care of just one account. We have other business to take care of. I am continually on the road. I am out of town 68 per cent of the time. And, of course, the check did not bounce until [57] June 27. That is when I really got angry.

Q. That is when you received your notice?

A. No; the slip is stamped June 27. That is when we received notice from the bank. That's right.

Q. That is when you really got angry. Didn't you know they might not do business with you when they mailed in their letter of the 12th?

A. I don't do business with that type of people. I am not in the practice of one day ordering and the next cancelling. When Mr. Lilien elects to telegraph you an order and in the middle of it starts cancelling,—I don't like to receive bum checks any more than anybody else does.

Q. Will you tell us the exact time of day that you received the letter?

A. It was approximately early afternoon. I could not give you the exact time.

Q. That is the Exhibit A I am referring to?

A. Approximately early afternoon.

Q. Now, did you do anything at all towards preparing the shipment of the brandy?

A. I gave my man instructions in New York, who handles that for me. It may have been the customs

(Deposition of Howard S. Bernon)

broker was given instructions and the I. T. Permit from the Federal Government.

Q. And upon what date did you do that?

A. On the 7th of June. Probably—I will take that back—[58] probably on the morning of the 8th, because I probably didn't start it into motion until—it was either the 7th or 8th at the latest.

Q. What did you do, if anything, by way of acknowledging the order from the defendant?

A. On June 9th, I wired for shipping instructions and acknowledged the order.

Q. Do you have a copy of that wire?

A. No; I haven't got it right now. I also received shipping instructions.

Q. Do you have a copy of those shipping instructions?

A. Yes; in reply to my wire.

Q. To whom was the wire sent?

A. Wire was sent to Weiner, who was acting both as our agent and as the Los Angeles Liquor Company's agent.

Mr. Zaller: I object to that and ask it be stricken.

Q. To get back to my original question, Mr. Bernon, I think I asked you: Did you communicate with the defendant company acknowledging the order?

A. I communicated with their representative.

Q. Did you send any communication to the Los Angeles Liquor Company, Inc., direct?

A. I don't remember whether I addressed the telegram which was addressed to Weiner care of the Los Angeles Liquor [59] Company, or I addressed it to his home.

(Deposition of Howard S. Bernon)

Q. But, in any event, that particular wire was addressed to Mr. Weiner? A. That is correct.

Q. Did you send any wire or write any letter to the Los Angeles Liquor Company, Inc., itself?

A. No; that was not necessary. The merchandise was ordered by Mr. Weiner who was acting as their agent.

Q. Now, can you tell us on what day you deposited the check which you received from the defendant company?

A. Check was not deposited by myself.

Q. This check is Plaintiff's Exhibit B.

A. The check was not deposited by myself. It was deposited by our banker, so I could not tell you on exactly what date they deposited the check.

Q. Well, refer to the check and see if you can tell us from the check on what date it was deposited?

A. Well, the check says, as far as I can read from the many stampings on the back of the check,—the earliest date seems to be June 16th.

Q. Is that June 16th? Oh, that is stamped on there for another purpose in connection with it.

A. It is the Federal Reserve Bank stamp.

Q. Where is your office?

A. 888 Union Commerce Building, Cleveland, Ohio.

[60]

Q. Where are the offices of the Manufacturers Trading Corporation?

A. 501 Guardian Building, Cleveland, Ohio.

Q. How far away from your office building is the office of the Manufacturers Trading Corporation?

A. One block.

(Deposition of Howard S. Bernon)

Q. You have constant dealings with the Manufacturers Trading Corporation? A. Yes, sir.

Q. That is, they deposit all of your moneys?

A. Yes, sir; that is true.

Q. Then you are constantly, or your office is constantly in touch with the Manufacturers Trading Corporation, receiving money from them, I take it, and depositing funds of yours? A. That's correct.

Q. Referring back to the matter of what was done by way of completing the order or filling the order, can you tell me just at what time or what date you gave the instructions to your representative in New York?

A. While I was in New York I gave the instructions, myself, verbally, because I telegraphed from New York. I talked to Mr. Lilien on the telephone from New York on June 5th. I was in New York for about a week there. As far as I can recall I gave instructions on the 8th. [61]

Q. Were you still in New York on the 8th?

A. Oh, yes. I was there for several days after that too.

Q. Whom did you give the instructions to?

A. Our customs brokers and office manager of our jobber in New York, who helps me in such matters like that, expedites the matters.

Q. What is the name of the expediter?

A. His name is Edward Drattler. D-r-a-t-t-l-e-r.

Mr. Walzer: I want to enter an objection to this line of questioning on the ground it is immaterial and irrelevant, all reference as to what he did.

Q. What is the address?

A. 400 Madison Avenue.

Q. New York? A. New York City.

(Deposition of Howard S. Bernon)

Q. Whom else had you communicated with?

A. I don't remember whether I communicated directly with my customs broker, or I asked Drattler to go out for me to the customs broker. His name is Happell, I think. I am not quite sure on the subject.

Q. You think this was all done about the 8th?

A. That is correct.

Q. The 8th of June, 1944?

A. Not only that, when I talked to Lilien on the 5th, he asked [62] me to please, not to sell the merchandise to anybody else; to put it aside for him. I gave instructions to my agents not to sell that merchandise, but to hold it, as it was being sold to the Los Angeles Liquor Company.

Q. If you spoke to him on the 5th, and you received information of that kind from Mr. Lillien, why is it that no letter was sent until the 12th of June by Mr. Lillien?

Mr. Walzer: I object to that.

Mr. Zaller: Pardon me. I will withdraw that.

Q. It was not sent by Mr. Lilien, but by Mr. Irven Rose.

Mr. Walzer: I still object on the ground this witness cannot possibly know why a letter was or was not sent by some one else.

A. No; I don't. I am just going to say I have no idea how they run their business out there. As a matter of fact—

(Colloquy ensued outside of the record.)

Q. Now, then, was Mr. Weiner your representative?

A. He was my representative and the Los Angeles Liquor Company representative.

(Deposition of Howard S. Bernon)

Q. But he was employed by you for the purpose of getting orders?

A. He was not employed by me; no. He was an agent working on a commission basis, as he was for other companies.

Q. You had an arrangement with him so that he could take [63] orders for you, and receive a commission on such orders as he produced?

A. The commission he would collect would be from us.

Q. That's right.

A. But in the letter of May 20th, written by Lilien to Imported Liquors Company, to my attention, he stated that Weiner is familiar with the Portugese brandy problem, and can advise me upon request of any of the dealings with the company. And incidentally Mr. Lilien had Weiner dictate the letter on his stationery, which Mr. Lilien signed.

Q. On whose stationery?

A. Los Angeles Liquor Company, Inc.

Q. Wouldn't you say the mere fact he was dealing with your representative—

Mr. Walzer: I object.

A. Why it would indicate that he had some confidence in the man.

Q. You mean that he was the agent of the Los Angeles Liquor Company?

Mr. Walzer: I object on the ground it is strictly argumentative. You don't have to answer that one.

Mr. Zaller: I want it answered for the record.

(Further colloquy ensued outside of the record.) [64]

(Deposition of Howard S. Bernon)

Mr. Walzer: You got my objection. Better read the question.

(Question read by the Reporter.)

A. Let me answer that by stating that it has been the practice in the liquor industry for the last few years for agents to represent sellers and at the same time also acting as agents for buyers, due to the fact that the buyers have been unable to get enough merchandise to satisfy their needs; and that is the general practice in the liquor industry.

Q. In this instance he was going to collect commission from you?

A. In most instances they collect the commission from the seller, but still act as an agent for the buyer. In fact, some of the agents which we have had were paid commissions when they came to us, even though they were acting as agents for certain purchasers in the country. That is the usual practice since the—since the stopping of distillation by the Federal Government for commercial use.

Q. How do you usually get your orders? Do you have order blanks, or any sort of an order form?

A. We do not have any order forms or blanks.

Q. Well, are your agents authorized to receive orders and bind you to the delivery of those orders?

A. Our agents receive orders when they send them in. Of course, in this case I talked to Lilien personally and only accept- [65] ed the order from him, as I agreed to accept the order on June 5th.

Q. Why, it is not the custom to accept the agent's order until you have confirmed it; is that correct?

A. That is usually the case.

(Deposition of Howard S. Bernon)

Q. I mean it is the case in this instance, too?

A. No; it was not, because I agreed with Lilien on the 'phone on the morning or afternoon of June 5th to accept his order, and agreed to put aside 1400 cases and not sell it to anybody else.

Q. As a result of which you never confirmed the order which you received, that you say you received from Weiner, or the order that you subsequently received on the 14th of June from Mr. Lilien—

Mr. Walzer: I object.

Q. —or Mr. Rose?

Mr. Walzer: Wait a minute. I object to the question on the ground it is based on an assumption that is not true. The witness has previously testified that he did send a wire or acknowledgment of the order requesting shipping instructions to Weiner on or about June 9th. That is in the record.

Mr. Zaller: That is a question, a matter of interpretation, whether when a wire was sent [66] asking for shipping instructions, whether that would constitute a confirmation or acceptance of the order.

Mr. Walzer: Want to reverse the question, Mort? The way the question was stated, the question was to the effect that there was no confirmation ever sent to either Weiner or any one else.

Mr. Zaller: Read the question.

(Question read by the Reporter.)

Q. (continuing) Was a confirmation, in so many words, ever sent to Mr. Lilien or the Los Angeles Liquor Company, Inc., direct?

Mr. Walzer: I object to that question. "In so many words." I don't know what you mean by that.

(Deposition of Howard S. Bernon)

Q. Did you do anything in the way of communicating with the Los Angeles Liquor Company, Inc., or Mr. Lilien direct, indicating in so many words that you accepted, had accepted his order?

A. I think to make the thing a little bit clearer for you, Lilien and I made a deal on June 5th. The only thing holding up the delivery was whether or not we could produce a photostatic copy of approval from the Food & Drug Administration. We had a deal. And I sent him a photostat, and in that letter I asked for him to wire. Instead he had his man Weiner wire me. [67]

Q. Was it customary for you to require that on any orders you received, which orders in that event would be written on the Weiner stationery or of the buyer, that the word "noncancellable" would appear thereon?

A. Would you mind repeating your question?

Mr. Walzer: Let me get an objection in on the ground it is immaterial. Now you may answer that.

(Question read by the Reporter.)

A. With some customers we do and with some we do not.

Q. Where do you draw the line?

A. Depending upon whether or not they are a new customer. How much we knew about his credit, and about his character, like any ordinary business would do.

Q. In this case was the order marked "noncancellable"?

A. Well, I could not mark it noncancellable in a 'phone conversation, nor on the telegram.

Q. How about the letter of June 12th?

A. It is not on the letter of June 12th, as far as I can see. I do not believe we asked them to put that on.

(Deposition of Howard S. Bernon)

Q. Do you also have a requirement that a check must accompany every order?

A. No. Again depending upon the customer.

Q. I mean deposit.

A. Again it would depend upon the customer. [68]

Q. Did you issue any instructions to Weiner that any order must be noncancellable and a check deposited, that the company check must accompany the order?

A. All I can remember of the case—I am speaking again from memory now, because I don't have any papers in front of me that would refresh my memory—I remember stating to Lilien on the telephone on June 5th, to send me in a check as evidence of good faith.

Q. You have copies of the warehouse receipt?

A. We don't have them. Our bankers have them, because they hold the merchandise as collateral.

Q. Can you give us a photostat of that?

A. I presume so.

Mr. Zaller: Would you object to our having that?

Mr. Walzer: No, sir.

Mr. Zaller: Let us assume that they are being introduced. I will introduce them now and have them marked as Defendant's Exhibit 1.

Mr. Walzer: This may be received in evidence. (Photostat copy of warehouse receipt, marked Defendant's Exhibit 1 for identification, is attached hereto and made a part hereof, the same as if fully rewritten herein.)

Q. Where was the brandy stored previous to June 12th? A. Rockefeller Center warehouse. [69]

Q. It is still at the Rockefeller Center warehouse?

A. Yes.

Mr. Zaller: That is all.

(Deposition of Howard S. Bernon)

Redirect Examination

of Howard S. Bernon by Mr. Walzer :

Q. Mr. Bernon, you addressed your letter of June 5th, Plaintiff's Exhibit C, to the Los Angeles Liquor Company, Inc., attention of Mr. Aaron Lilien?

A. That's correct.

Q. Who answered that letter?

A. Mr. Weiner said this would acknowledge receipt of your letter of—dated June 5th, and addressed to the Los Angeles Liquor Company. He also stated, . . . “which Mr. Aaron Lilien handed me to clear with the California Pure Food and Drug office.”

Q. You testified, Mr. Bernon, that you first wrote to the Los Angeles Liquor Company, Inc., on June 29th, after having received their wire of cancellation. What is the fact as to when you first discovered that payment had been stopped on this check? A. June 27th.

Q. So you then wrote approximately two days after you received that notice? A. Yes.

Q. Is it customary for you, Mr. Bernon, to permit the [70] cancellation of orders which are not marked “non-cancellable”?

Mr. Zaller: I object.

Mr. Walzer: Right in line with your inquiry.

A. We do not permit the cancellation of any orders any more than we cancel orders with other people that we might place.

(Telegram dated June 9th, marked for the purposes of identification, Plaintiff's Exhibit J.)

Q. Handing you what has been marked for the purposes of identification Plaintiff's Exhibit J, I ask you if you received this telegram from Mr. M. D. Weiner?

(Deposition of Howard S. Bernon)

Mr. Zaller: I object to the introduction of the wire, or of any questions in regard to it.

A. I did receive the wire.

Q. Do you know what this wire was in response to?

A. In response to a wire which I sent on the same day.

Q. What was the substance of the wire which you sent?

A. Wherein I acknowledged the order and asked for shipping instructions.

Q. Which order do you have reference to?

A. Order for 1400 cases of Suarez brandy placed by the Los Angeles Liquor Company, Inc.

Mr. Walzer: I offer Plaintiff's Exhibit J in evidence.
[71]

Mr. Zaller: What is the date of that wire?

The Witness: 9th.

Mr. Zaller: I object to it.

By Mr. Walzer:

Q. Handing you what has been marked Defendant's Exhibit 1, are you able to tell us what it represents?

A. Yes.

Q. What does Defendant's Exhibit 1 represent?

A. Defendant's Exhibit 1 is a photostatic copy of a warehouse receipt, issued by Rockefeller Center Warehouses, Inc., of New York, for the account of Manufacturers Discount Corporation dated May 26th, 1944, covering in all 1500 cases of Suarez brandy. You will notice the receipt is issued for the account of Manufacturers Discount Corporation. Manufacturers Discount Corporation is a wholly owned subsidiary of our bankers, Manufacturers Trading Corporation and conducts busi-

(Deposition of Howard S. Bernon)

ness for them in the State of New York. You will note that the upper left corner of this certificate bears the following quotation: "Reference Imported Liquor Company." 1400 cases of this brandy were subsequently segregated for the account of the Los Angeles [72] Liquor Company, Inc., in accordance with their order.

Mr. Walzer: That is all.

Mr. Zaller: That is all.

Stipulation

It is stipulated and agreed by and between counsel for the respective parties herein that the signature of the witness, Howard S. Bernon, to this deposition is hereby expressly waived; and that it is to have the same force and effect as though signed by the witness.

(Deposition closed.) [73]

Certificate

The State of Ohio,
County of Cuyahoga—ss.

I, Harry Herman, a Notary Public, in and for the State of Ohio, duly commissioned and qualified, do hereby certify that the deposition of Howard S. Bernon was taken before me on Tuesday, the 19th day of December, 1944, at the offices of E. Z. Shapiro and S. K. Walzer, 540 Guardian Building, Cleveland, Ohio, pursuant to the annexed notice and stipulations and agreement of counsel for the respective parties herein, and completed without adjournment; that the above named Howard S. Bernon was by me first duly sworn to testify the truth, the whole truth and nothing but the truth; that the deposition, as

above set forth, was taken by me in shorthand and by me reduced to typewriting; that pursuant to the stipulation and agreement entered into between counsel for the respective parties and the witness, the signature to his deposition was expressly waived, it being agreed that the deposition when transcribed and filed by the Notary shall be of the same force and effect as though signed by the said witness.

I do further certify that I am not a relative of or attorney for any of the parties, or otherwise interested in the event of this cause. [74]

In Witness Whereof, I have hereunto set my hand and official seal this 6th day of January, A. D. 1945.

[Seal]

HARRY HERMAN

Notary Public in and for the State of Ohio.

My Commission expires 7-20-46.

Cost Bill

Attendance	\$13.00
Transcript 100 F @ 25¢	25.00
Photostats	5.00
Certification	.35
Swearing witness	.50
Postage	.74
Exhibits, marking, etc.,	5.00
Total	<hr/> \$49.50

To be taxed as costs and payable to the Plaintiff.

[Seal]

HARRY HERMAN

Notary Public

State of Ohio,
Cuyahoga County—ss.

I, Leonard F. Fuerst, Clerk of the Court of Common Pleas, a Court of Record of Cuyahoga County, afore-said, Do Hereby Certify That, Harry Herman before whom the annexed acknowledgment, oath, affidavit, was taken, was at the date thereof a Notary Public, in and for said County, duly authorized by the laws of Ohio to take the same, also to make acknowledgments, affidavits and proofs, of deeds or conveyances for land, tenements or hereditaments situated and lying in said State of Ohio, and further that I am well acquainted with his handwriting and believe his signature thereto is genuine, and that the annexed instrument is executed according to the laws of the State of Ohio. Commission expires July 20, 1946.

In Testimony Whereof, I hereunto subscribed my name and affix the seal of said Court, at Cleveland, Ohio, this 8th day of Jan. A. D. 1945.

(Seal) No. N 9465 LEONARD F. FUERST

Clerk. [75]

[PLAINTIFF'S EXHIBIT A]

LOS ANGELES LIQUOR CO INC.

Distributors of 3315 East Vernon Avenue
Wines and Liquors Los Angeles 11, California
Telephone KImball 7178

June 12, 1944

Imported Liquors Company,
888 Union Commerce Building
Cleveland, 14, Ohio, U. S. A.

Gentlemen,

Purchase Order

This will be your authority to ship 1400 cases Suarez brandy at \$41.55 per case F.O.B. Atlantic Port, draft attached to bill of lading less \$1.00 per case deposit which is herein enclosed (\$1,400.00) less Internal Revenue Taxes, Duties and the additional Federal Tax.

Goods to be shipped in bond in care of the Frank P. Dow Co., 354 So. Spring St., Los Angeles, California.

Please furnish the Frank P. Dow Co., your Federal Import licenses number in the event they may require it and also please mail them the bill of lading and oblige.

Yours very truly,

Los Angeles Liquor Co. Inc.,

Irven Rose

per Irven Rose

Air Mail—Special Delivery

Enclosure (\$1,400.00 Check Deposit)

Our Bank is Bank of America, Vernon Branch,
3801 Santa Fe Ave.

Our California State Import license is L-136 G
[Written]: O. K. M. D. Weiner [76]

[PLAINTIFF'S EXHIBITS B]

Deposit on 1400 cases Suarez Brandy W 6/22/44

Los Angeles Liquor Company, Inc. No. 6565

3315 East Vernon Avenue

KImball 5188 [Payment Stopped] [N. P.]

#3 [6-4]

[Payment Stopped] Los Angeles, Calif. June 12th 1944

Pay to the

Order of Imported Liquors Company \$1,400.00

Los Angeles

*1400 Dol's .00 Cts.....Dollars

Meat Co.

90-848 Vernon Branch 90-848

Los Angeles Liquor Company, Inc.

By Irven Rose

President

Bank of America

National Trust and Savings

Association

3801 Santa Fe Avenue

Los Angeles, California

[Endorsements on Back] [77]

[PLAINTIFF'S EXHIBIT B-1]

CENTRAL NATIONAL BANK OF CLEVELAND
Cleveland, Ohio

6/26/44

We Have Charged Your Account for the Following Item
Drawn on Bank of America Branch Los Angeles Calif
Drawn by Los Angeles Liq Co Inc
Reason for Return Payment Stopped

Amount \$.....

Protest Fees \$.....

Total \$1400.00

Manufacturers Trading Corp
501 Guardian Bldg
Cleveland Ohio

[Stamped] Teller's Copy

M CL

Date.....

Received the Item Described Above [Written] V16339
[Stamped] Jun 27 1944]

[PLAINTIFF'S EXHIBIT B-2]

Returned to No.....

By Vernon

Branch No. 372

BANK OF AMERICA

National Trust and Savings Association

\$.....

Only one item to be returned on this slip.

Reason noted below marked X.

* * * * *

4 X Payment stopped [78]

* * * * *

[PLAINTIFF'S EXHIBIT C]

June 5th, 1944

Los Angeles Liquor Co., Inc.

3315 Vernon Avenue

Los Angeles 11, Cal.

Attention: Mr. Aaron Lilien

Gentlemen:

Enclosed please find photostat of approval on a shipment of brandy which recently arrived in this country, by Federal Security Agency Food and Drug Inspection Station. Of these 1500 cases there are 1400 left and I will hold them for you for the next few days as per our telephone conversation of today. In view of the fact that this merchandise has been passed already it will not be necessary to submit it to the Federal Government for further inspection when it arrives in California. You certainly will not have any trouble on this lot if the State also makes an inspection.

Please wire me as soon as you know whether or not you desire these 1400 cases Suarez Brandy. Incidentally, the strip stamps are already affixed and shipment can be made immediately.

Yours very truly,

Imported Liquors Company
Howard S. Bernon

Managing Partner

HSB/ds

Encl. [79]

[PLAINTIFF'S EXHIBIT D]

WESTERN UNION

* * * * *

1944 JUN 14 PM 4 25

AB49

SA445 34—LOS ANGELES CALIF 14 124OP
IMPORTED LIQUOR CO—

888 UNION COMMERCE BLDG CLEVE—
IRVEN ROSE WHO PLACED ORDER WITH YOU
FOR 1400 CASES FUAREZ BRANDY SOLD HIS
INTEREST IN LOS ANGELES LIQUOR COM-
PANY NO LONGER WITH US PLEASE CANCEL
ORDER AND RETURN DEPOSIT CHECK AND
OBLIGE CONFIRM—

1400.

AARON LILIAN. [80]

[PLAINTIFF'S EXHIBIT E]

LOS ANGELES LIQUOR CO. INC.

Distributors of
Wines and Liquors

3315 East Vernon Avenue
Los Angeles 11, California
Telephone KImball 7178

20 May 1944

Imported Liquors Co.,
888 Union Commerce Bldg.,
Cleveland, Ohio

Dear Mr. Bernon:

With regards to Imported Portugese Brandies, please
be advised that in California Mr. Milton P. Duffy, Chief,
Bureau Food & Drug Inspection has quarantined a con-

siderable quantity that was purchased, both on a direct basis and in bond, Philadelphia, by various firms in California and upon arrival of which, some of the Brandy in question was found adulterated as containing glass and other foreign material, same being in violation of the California health and safety code. The Department, therefore, decided that the following procedure be carried out:

1. A representative number (12) of the Brandy in question is to be submitted to a glass expert for examination to determine whether or not the bottle is suitable for use for the packaging of brandy. These representative samples shall be taken at random from your lot by an inspector of this Department.

2. A copy of the report from the glass expert must be submitted to this Department before authorization will be given for the filtering and rebottling of the Brandy.

3. If the bottle is found suitable for repackaging, the sample must be rinsed and cleaned before the filtered brandy is contained therein. If the bottle is found to be defective, the brandy must be filtered and bottled in new, clean bottles.

It will, therefore, be necessary to send in a written request for authorization to use the above described procedure for any shipments of Imported Portugese Brandies into the State of California.

In view of the above, and if you still think that your Brandy will pass the necessary inspection, and upon receipt of advice from you, that you are willing to accept

an order on this basis, we will be happy to hand one over to your Representative, Mr. Morris D. Weiner, who incidentally is familiar with our Portugese Brandy problem and can further advise you, upon request.

Yours very truly,

Los Angeles Liquor Co. Inc.

MDW:jrw

Per Aaron Lilien

Dictated by M. D. Weiner

Aaron Lilien [81]

[PLAINTIFF'S EXHIBIT F]

Copy

June 29, 1944

Los Angeles Liquor Co., Inc.,
3315 East Vernon Avenue,
Los Angeles, California (11).

Attention Mr. Aaron Lilien.

Gentlemen:

We were, indeed, surprised to receive your telegram dated June 14, attempting to cancel your order for 1400 cases Suarez Brandy, on the ground that Mr. Irven Rose "sold his interest in Los Angeles Liquor Company". We were all the more surprised this morning to receive returned to us unpaid your \$1400.00 check, dated June 12. and marked "Payment Stopped".

This order was placed by your company in good faith and was taken by us in good faith. We can not understand what relationship to this matter has the sale by Mr. Rose of his stock in your company. The corporation is still liable for its debts, isn't it? In addition, it should be noted that it was you personally who corresponded with us about this merchandise, and wrote to us on May 20,

1944, offering to place the order through Mr. Morris D. Weiner.

Some of our friends among the liquor wholesalers, indeed, have a very funny approach to business. When they want the merchandise, they will do anything to get it, but when the first cold wind blows, they will do anything to avoid taking in merchandise, even though it means the promiscuous breaking of contracts and hurting their own reputations by it. Frankly, we believe you are unduly scared by the so-called domestic distillers "holiday", which has been announced for August. This whole country will not be flooded with alcohol and whiskey by a month's distillation. I believe it is quite clear that the whiskey distillers will probably not be able to increase their allotments to wholesalers to the extent of more than ten, or at most fifteen per cent.

Under these circumstances, we suggest that you send us by air mail a new check for \$1400.00 and we will return your June 12th check, which has been marked "Payment Stopped". We will then promptly ship the merchandise to you against sight draft as agreed upon. Unless we receive your favorable reply by return air mail, we shall, of course, be compelled to turn the file over to our attorneys, with instructions to file suit against your company for the full amount due for the 1400 cases of brandy, which you purchased from us.

We do not usually force our customers to buy merchandise from us, but we do feel that one should live up to his contract, and we intend to see to it that your company does, in this instance.

Very truly yours,

Imported Liquors Company

[PLAINTIFF'S EXHIBIT G]

M. D. Weiner
15 Paloma Avenue
Venice, California
June 7, 1944

Imported Liquors Company
888 Union Commerce Bldg.,
Cleveland 14, Ohio

Attn: Mr. Howard S. Bernon

Gentlemen:

This will acknowledge receipt of your letter dated June 5, addressed to the Los Angeles Liquor Company and photostatic copy of the New York inspection No. 68041 pertaining to 1500 cases Suarez Portuguese Brandy which Mr. Aaron Lilien handed me to clear with the California Pure Food and Drug office. I will therefore wire you the following night letter "Sold Los Angeles Liquor Company 1400 cases Suarez Brandy upon receipt of confirmation by wire or phone the Los Angeles Liquor Company will mail you 1400 dollars deposit as per your original instructions to me. advise." M. D. Weiner

Incidentally, this is the only sale that I can make for your account due to the fact that I started this deal prior to receiving an answer from Mr. J. T. Laird 111 of which I have already advised you.

Kindest regards.

Sincerely yours,

M. D. Weiner
M. D. Weiner

cc: Mr. Martin B. Lane,
Mr. J. T. Laird 111 [83]

[PLAINTIFF'S EXHIBIT H]

WESTERN UNION

* * * * *

AAO3

1944 JUN 7 PM 9 13

SA 575 NL—SANTA MONICA CALIF 7
IMPORTED LIQUORS CO—

888 7'89' :9% %34:3 ?)\$& :)3; 3—

RELET JUNE 5. SOLD LOS ANGELES LIQUOR
COMPANY 1400 CASES SUAREZ PORTUGUESE
BRANDY. UPON RECEIPT OF YOUR CONFIR-
MATION. BY WIRE OR PHONE THE LOS AN-
GELES LIQUOR COMPANY WILL MAIL YOU
\$1400.00 DEPOSIT AS PER YOUR ORIGINAL IN-
STRUCTIONS TO ME. ADVISE—

M D WEINER.

5 1400 SUAREZ \$1400.00. [84]

[PLAINTIFF'S EXHIBIT I]

FEDERAL SECURITY AGENCY
FOOD AND DRUG INSPECTION STATION

Lab. No. NY 68041

May 15, 1944

Imported Liquors Co.
888 Union Commerce Bldg.
Cleveland

Dear Sir:

The examination of your shipment of Brandy per S. S.
C/Wise S/S San Rhome Entry No. 35018 from
La Suarez Co. Ltd. Oporto 2/-/44

(Shipper or manufacturer) (Cons. invoice) (Place) (No.) (Date)

Marks and Nos. 1500 cs. has been completed and the
goods need not be further detained, insofar as section
801 of the Federal Food, Drug, and Cosmetic Act is
concerned.

Respectfully,

H. Markowitz

Acting Chief of Station. [85]

[PLAINTIFF'S EXHIBIT J]

WESTERN UNION

* * * * *

1944 JUN 9 AM 3 05

AA53

SA864 NL—SANTA MONICA, CALIF 8

IMPORTED LIQUORS CO—

888 UNION COMMERCE BLDG CLEVE—

RECEIVED WIRE SHIP IN CARE OF FRANK P
DOW CO 354 SOUTH SPRING ST LOS ANGELES
CALIFORNIA PROVIDING JUAREZ BRANDY
LABEL AND PRICE HAS BEEN APPROVED BY
WASHINGTON LOS ANGELES LIQUOR MAILING
DEPOSIT AND PURCHASE ORDER FOR 1400
CASES JUAREZ BRANDY BASIS 41.55 PER CASE
STOP I HAVE NOT YET RECEIVED AN AN-
SWER TO MY LETTER TO YOU DATED MAY
18TH WHEREIN I COMMENTED THAT 25
CENTS COMMISSION IS NOT SUFICIENT AND
REQUEST 50 CENTS PER CASE IN ORDER HAVE
THE RECORD CLEAR SO THAT THERE CAN
BE NO MISUNDERSTANDING BETWEEN US
PLEASE CONFIRM BY WIRE OR LETTER AND
OBLIGE—

M D WEINER.

354 1400 41.55 18 25 50. [86]

DEFENDANT'S EXHIBIT NO. 1

Reference
Imported Liquor
to

Number 8051

4

Rockefeller Center Warehouses, Inc.

BONDED WAREHOUSE

50 Rockefeller Plaza

New York, N. Y. May 26th 1944

THIS IS TO CERTIFY that we have received in Storage Warehouse, ROCKEFELLER

CENTER, 50 ROCKEFELLER PLAZA, NEW YORK, for the account of *Manufacturers Disposal Corp*

261 Fifth Ave Ex. G.C. # 35947 - 7/8 San Thome 3/24/44
I.T. 4425

in apparent good order, except as noted hereon (contents, condition and quality unknown) the following described property, subject to all the terms, provisions, exceptions, limitations, stipulations and conditions contained herein and on the reverse hereof, such property to be delivered to their order, upon the payment of all storage, handling and other charges, compliance with the United States custom regulations and presentation of custom house permit.

Bond 35018

MARKS	NUMBERS	PACKAGES	SAID TO BE OR CONTAIN
5050/6549		One Thousand Five Hundred 1500 c/s	La Saveroy Brandy 35
		1500	

notations from book

11 full 1 BK - 5869-6075 or 6073-6525-6311	4 full 1 out - 5207-5708-5579
5800-6330-5813-5866-5147	10 full 2 BK 6274-5798-5331
5825-5288-6357-6300-6385	6231-6315-5512
6416-5754-5823-6015-6259	6149-5197-6269
5752-6178-6083-6549-5737	5704-6534-6052
5818-6057-5899-5594-5157	6510-6351
5857-6147-5221-5467-5347	10 full 2 out - 5187
6036-6075-5287-6529-5282	9 full 3 BK - 5303-5871
5368-6124-6430-5081-5265	6151-6257
5852-5090-5270-5267-5202	6306-6245
5155-6354-5164-5286-5841	5249-5478
5323-6237-5128-5520-5489	8468
6103-6477-5325-6511-5372	9 full 1 BK 6 out - 6463
6400-6091	8 full 4 out - 5858
	6 full 6 BK 6106

NON-NEGOTIABLE

Storage 2 1/2¢ per case per month
Labor 2 1/2¢ per case in and out inclusive.
Charges from 4/17/44 19
Advances have been made and liability incurred on such goods as follows:

P. S. Gortage

GOODS IN BOND # 35018

OK-6016-5315
7728-6857
5110-5209
5945-5715

ROCKEFELLER CENTER
WAREHOUSES, Inc.

claims a lien for all lawful charges for storage and preservation of the goods, also for all lawful claims for money advanced, interest, insurance, transportation, labor, weighing, cooping and other charges and expenses in relation to such goods.

Rockefeller Center Warehouses, Inc.

By August J. Gurney

[Title of District Court and Cause.]

PLAINTIFF'S NOTICE OF MOTION FOR
SUMMARY JUDGMENT

To the defendant and to Messrs. Behrstock & Rudnick,
its *attorney*:

Please Take Notice that the plaintiff herein, on Monday, February 19, 1945, at the hour of 10:00 o'clock A. M., or as soon thereafter as the matter may be reached on the calendar, in the courtroom of the Honorable Peirson M. Hall, Federal Building, Temple and Spring Streets, Los Angeles, California, will move the Court for a summary judgment in favor of the plaintiff for the purchase price of the personal property described in the complaint, in accordance with the prayer of the complaint. [88]

Said motion will be made in accordance with Rule 56 of the Rules of Civil Procedure for the District Courts of the United States on the ground that there is no genuine issue as to any material facts and that the plaintiff is entitled to judgment as a matter of law.

Said motion will be based upon all the pleadings, records, and files of this action, upon this notice, upon the supporting affidavit of Howard Bernon served and filed concurrently herewith, and upon the deposition of Howard Bernon on file, together with exhibits attached thereto.

Dated: February 7, 1945.

EZRA Z. SHAPIRO and S. K. WALZER
and

BENJAMIN, LIEBERMAN & ELMORE,
By Aaron Elmore

Attorneys for Plaintiff. [89]

Points and Authorities

One of the rights of a vendor of personal property under a contract of sale, upon the refusal of the vendee to take the property and pay the agreed price, is "standing on the sale the vendor may retain the property for the vendee and sue for the purchase price".

Porter vs. Gibson, 25 A. C. 499 at 507 (Dec. 1944);

Cuthill vs. Peabody, 19 Cal. App. 304, at 308;

1783 Civil Code;

22 Cal. Jur. 1062, 1067.

Summary judgment should be granted if the pleadings, affidavits and exhibits show that the moving party is entitled to the relief sought.

Securities & Exch. Com. v. Payne, (DC-NY), 35 F. Supp. 873;

Securities & Exch. Com. v. Payne, (DC-NY), 35 F. Supp. 873;

Farley v. Abbetmeier, 72 App. DC 260, 114 F. (2d) 569;

Miller v. Miller, 74 App. DC 216, 122 F. (2d) 209;

Fraser v. Doing, App. DC, 130 F. (2d) 617.

The record, affidavit and deposition show without conflict that plaintiff made an offer to defendant contained in its letter to defendant of June 5, 1944 which was unqualifiedly accepted by defendant by its purchase order dated June 12, 1944. The telephone conversation of June 5, 1944 and the various telegrams and other letters pass-

ing between the parties, in various degrees confirm the offer and acceptance.

After the contract became complete by the offer and acceptance the defendant ineffectually endeavored by its telegram of June 14, 1944 to withdraw its acceptance for a reason which is now disclaimed and which, of course, can have no effect on the completed contract.

Respectfully submitted,

EZRA Z SHAPIRO and S. K. WALZER

and

BENJAMIN, LIEBERMAN & ELMORE.

By Aaron Elmore

Attorneys for Plaintiff

[Endorsed]: Filed Feb. 9, 1945. [90]

[Title of District Court and Cause.]

AFFIDAVIT OF HOWARD BERNON IN SUP-
PORT OF PLAINTIFF'S MOTION FOR SUM-
MARY JUDGMENT [91]

State of Kentucky
County of Hardin—ss.

Howard Bernon, being first duly sworn, deposes and says that the following facts are within his personal knowledge and, if he is called as a witness in the above entitled action, he can and will testify competently thereto that, at all times mentioned in the Complaint filed herein, he was a partner in Imported Liquors Company, a partnership of Cleveland, Ohio, the complainant herein:

That on or about January 2, 1945, he entered the armed forces of the United States;

That he has been engaged in the liquor business since 1934;

That on May 20, 1944, the defendant in reply to an offer made by the plaintiff sent a certain letter dated as of the same day to the defendant, agreeing to purchase the brandy from the plaintiff on the basis set forth in said letter (Plaintiff's Exhibit "E"). (Please note that all references to exhibits are to exhibits which have been made a part of the deposition of Howard Bernon, said deposition having been filed with this court in the within captioned matter.)

That on June 5, 1944, in a telephone conversation between Mr. Lilien, representing the defendant, and Mr. Bernon, all conditions of the [92] acceptance of the Los Angeles Liquor Company, dated May 20, were met and the acceptance of the Los Angeles Liquor Company order for fourteen hundred (1400) cases of Suarez Portuguese Brandy was confirmed by Mr. Bernon. In accordance with Mr. Bernon's confirmation on June 5, 1944, he mailed to the Los Angeles Liquor Company a photostatic copy of the approval of the Federal Security Food and Drug Inspection Station (Plaintiff's Exhibit "I").

That on June 7 Mr. Weiner, at the express request of the defendant, answered plaintiff's letter of June 5, 1944. This letter of June 7 (Plaintiff's Exhibit "G") acknowledged receipt of the photostatic copy of the approval, and further stated that a telegram would be sent confirming the purchase. This telegram of confirmation by the defendant was sent on June 7 (Plaintiff's Exhibit "H"). That the formal purchase order of the defendant dated June 12, 1944 (Plaintiff's Exhibit "A"), together with

the check of the defendant in the sum of Fourteen Hundred Dollars (\$1400.00) dated June 12, 1944 (Plaintiff's Exhibit "B"), were received prior to the receipt of the defendant's telegram of attempted cancellation dated June 14, 1944 (Plaintiff's Exhibit "D"). That the transaction for the purchase of fourteen hundred (1400) cases of Suarez Brandy by the defendant from the plaintiff had been consummated on June 5, 1944, and that the letter of **June 7, 1944** (Plaintiff's Exhibit "G"), the telegram of June 7, 1944 (Plaintiff's Exhibit "H"), the letter of defendant dated June 12, 1944 (Plaintiff's Exhibit "A"), and the check of defendant dated June 12, 1944 (Plaintiff's Exhibit "B") are all confirmations of the fact that the transaction had been consummated and completed on June 5, 1944.

That he knows of no custom or usage in the wholesale liquor business in California or elsewhere requiring the seller to confirm any order received, but that, on the contrary, it has been the custom and usage for the seller to offer his wares by means of price lists and advertisements and any order by a purchaser constitutes an acceptance of the offer to sell.

That, on or about June 13, 1944, the liquor trade was made aware of the fact that there was to be a "liquor holiday", under the terms of which a certain amount of domestic whiskies would be made available for the market; [93] that this "liquor holiday" reduced saleability of all brands of imported brandy and more particularly the Suarez Brandy, which is the subject matter of this suit; that the Imported Liquors Company continued to offer for sale Suarez Brandy at the same price at which the defendant purchased said Suarez Brandy to the wholesale liquor market in the United States but that

the last sale of said brandy which it was able to make was on June 17, 1944, and that, subsequent to June 17, 1944, it has been unable to sell any of said brandy; that the reasonable market value of said brandy on September 22, 1944, was approximately \$5.00 per case in bond and that, as of today, the present reasonable market value of said brandy is approximately \$2.00 per case in bond.

That the letter of May 20, 1944 (Plaintiff's Exhibit "E"), addressed to the plaintiff by the defendant and signed by Aaron Lilien, bears the notation on its face that it was dictated by M. D. Weiner; that M. D. Weiner, referred to in the affidavits of Irven Rose and Aaron Lilien, answered a certain letter dated June 5, 1944, addressed to the defendant by the plaintiff (Plaintiff's Exhibit "C", Deposition of Howard Bernon filed herein), and that said M. D. Weiner acted as the agent of the defendant in responding to said letter in its behalf on June 7, 1944 (Plaintiff's Exhibit "G", Deposition of Howard Bernon filed herein).

HOWARD S. BERNON

Subscribed and sworn to before me this 30 day of January, 1945.

LeROY G. FINN

18th H. Inf. Adjutant

Received copy of the within Affidavit of Howard Bernon in Support of Plaintiff's Motion for Summary Judgment this 8th day of February, 1945. Behrstock & Rudnick, by Ben H. Rudnick, Attorneys for Defendant.

[Endorsed]: Filed Feb. 9, 1945. [94]

[Title of District Court and Cause.]

DEFENDANT'S STATEMENT IN OPPOSITION
TO MOTION FOR SUMMARY JUDGMENT

Comes now the defendant Los Angeles Liquor Company, Inc., a Corporation, and opposes the motion of plaintiff for summary judgment upon the ground that the order of June 12, 1944, a copy of which is attached to the affidavit of Irven Rose in support of defendant's motion for a summary judgment, was not accepted by the plaintiff and notice of such acceptance given to defendant prior to defendant's cancelation thereof, and that therefore no agreement of sale existed between the parties.

That said opposition will be based upon the supplemental affidavit of Aaron Lilien attached hereto, and upon the affidavits of Irven Rose, Aaron Lilien and M. D. Weiner, and Points and Authorities attached to the *defen-tiff's* motion for a summary judgment on file in this case.

Respectfully submitted

BEHRSTOCK & RUDNICK

By Ben H. Rudnick

Attorneys for Defendant [95]

[Title of District Court and Cause.]

SUPPLEMENTAL AFFIDAVIT OF
AARON LILIEN

State of California

County of Los Angeles—ss:

Aaron Lilien, being first duly sworn deposes and says: That the following facts are within his personal knowledge, and if he is called as a witness in the above entitled action he can and will competently testify thereto:

That either at the end of May, or the beginning of June, 1944 affiant received a long distance telephone call from a person who represented himself to be Howard Bernon of Imported Liquors Company, of Cleveland, Ohio. That said Howard Bernon told affiant that he had a shipment of brandy which had been approved by the Federal Government and asked affiant whether that would satisfy the requirements contained in affiant's [96] letter of May 20, 1944. That affiant answered that was not sufficient, because the brandy had to be passed by the California authorities in addition to the Federal Government, and that Mr. Bernon's local representative, Mr. Weiner, was familiar with the requirements of the California authorities and should be able to give him whatever information he desired.

That Mr. Bernon then asked affiant how much Suarez brandy the Los Angeles Liquor Company could use. That affiant stated he could not answer that question until he had discussed it with other members of his firm, but that in any event no consideration would be given to any order until he was convinced that the brandy would pass the California authorities.

That when affiant received the letter dated June 5, 1944 from plaintiff he contacted Mr. Weiner and handed it to him for the sole purpose of checking with the California authorities.

That affiant has been engaged in the sale of liquor at wholesale in California for a period of six years, and is acquainted with the market price of Portuguese brandy, and that the market price of Portuguese brandy has not declined since May or June of 1944.

AARON LILIEN

Affiant

Subscribed and sworn to before me this 13th day of February, 1945.

(Seal)

BEN H. RUDNICK

Notary Public in and for said County and State

[Endorsed]: Filed Feb. 15, 1945. [97]

[Title of District Court and Cause.]

AFFIDAVIT OF JOSEPH SACHS IN SUPPORT
OF PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT AND IN OPPOSITION TO DE-
FENDANT'S MOTION FOR SUMMARY JUDG-
MENT [98]

State of New York,
County of New York,
City of New York—ss:

Joseph Sachs, first being duly sworn according to law, deposes and says that he resides at 4508—39th Avenue, Long Island City, New York.

Affiant further states that he is the Owner of Atlantic Liquor Wholesalers, a wholesale liquor company doing business in the City of New York under appropriate Federal and State Licenses: that in connection with said business Atlantic Liquor Wholesalers has, during its fiscal year recently ended, transacted several million dollars worth of business in the sale to retail liquor stores in New York City and in other cities in the State of New York, of whiskey, brandy, gin, rum and cordials of various types, both domestic and imported.

Affiant further states that he is fully conversant with, and experienced in, the purchasing and selling of domes-

tic and imported liquors; that he is in constant and close touch with other wholesalers and importers and follows up closely the current market prices and market trends in the liquor industry.

Affiant further states that during the last year he purchased numerous cases of Suarez Brandy, imported from Portugal, and that at the present time he has in his warehouses several thousand cases of *Portugues* Brandy of several brands acquired by him from Imported Liquors Company of Cleveland, Ohio, and from other licensed importers; all of which is unable to dispose of to the retail stores or to other wholesalers, at this time, at any price, there existing practically no current active market for such merchandise.

Affiant further states that, within the last two days, he has received firm offers from a larger liquor importing and wholesaling company, with warehouse and offices in the States of New York, Connecticut, Florida and New Jersey, for the sale to Atlantic Liquor Wholesalers of approximately twelve-hundred and fifty cases of Portuguese Brandy, bottled in fifths, at \$4.00 per case, F.O.B. New York City, in Bond. The said merchandise is guaranteed to be of good quality and passed by the Pure Food and Drug Administration. Affiant further states that the aforesaid brandy offered to him at \$4.00 per case is fully comparable in quality, source, and type of packaging, to Suarez Brandy, with which he is personally familiar.

Affiant further states that he did not take advantage of the said \$4.00 per case offer, nor did he purchase the said merchandise, in view of his own knowledge and belief that the present market price and value of Suarez

and similar Portuguese Brandy, for sale by importers to wholesalers, would not exceed \$2.00 per case, plus taxes.

A true photostatic copy of the said importer's letter, dated February 6, 1945, offering Portuguese Brandy at \$4.00 per case, is attached hereto and made a part hereof.

Further Affiant sayeth not.

JOSEPH SACHS

Sworn to before me and acknowledged in my presence by the said Joseph Sachs, personally known to me, this 7th day of February, 1945, in the City of New York.

DAVID GLASSBERG

Notary Public, Qns. Co. Clk's No. 3252, Reg. No. 196-G-5
N. Y. Co. Clerk's No. 855, Reg. No. 495-G-5.

Commission Expires March 30, 1945. [99]

SEGGEMAN NIXON CORPORATION

Importers and Distillers Representatives

111 Eighth Avenue

New York

February 6th, 1945

Atlantic Liquor Wholesalers

400 Madison Avenue

New York, 17, New York

Attention: Mr. Joseph Sachs

Gentlemen:

We confirm herewith our telephone conversation in reply to your inquiry regarding our Congresso Portuguese Brandy.

We have available, for immediate delivery, the following

1,169 cases of Congresso, fifths

115 cases of Lusitana, fifths

The price of each of these brands is \$4.00 per case, in bond, f. o. b. Bonded Warehouse, New York City. The terms are net cash. This merchandise is sound and of good quality and has been passed by the Pure Food and Drug Administration.

We would be pleased to accept your order for this merchandise and look forward to the pleasure of hearing from you.

Yours very truly

SEGGERMAN NIXON CORPORATION

n

J. R. Kitrosser

[Endorsed]: Filed Feb. 19, 1945. [100]

In the District Court of the United States for the
Southern District of California
Central Division

No. 3891-PH

IMPORTED LIQUORS COMPANY, a partnership,
888 Union Commerce Building, Cleveland, Ohio,
Plaintiff

-vs-

LOS ANGELES LIQUOR COMPANY, INC., a Corporation,
3315 East Vernon Avenue, Los Angeles, California,
Defendant

JUDGMENT

Plaintiff's Motion for Summary Judgment and the defendant's Motion for Summary Judgment came on regularly for hearing before the Court, Honorable Peirson M. Hall Judge presiding, on the 19th day of February, 1945

at the hour of ten o'clock A. M., Ezra Z. Shapiro and S. K. Walzer and Benjamin, Lieberman & Elmore by Aaron Elmore, Esquire, appeared as attorneys for plaintiff and Behrstock & Rudnick, by Ben H. Rudnick, Esquire, appeared as attorneys for the defendant, and the Court having heard the argument of counsel, and having taken said matters under submission, and having examined and considered the respective Motions for Summary Judgment, and the affidavits, exhibits and depo- [102] sitions in support and opposition thereof, and being fully advised in the premises, Now, Therefore,

It Is Ordered, Adjudged and Decreed:

1—That plaintiff's Motion for Summary Judgment be and the same hereby is denied.

2—That defendant's Motion for Summary Judgment be and the same is hereby granted.

3—That judgment be entered in favor of the defendant Los Angeles Liquor Company, Inc., a Corporation, and against the plaintiff Imported Liquors Company a Partnership, consisting of Howard S. Bernon and Ruth B. Bernon, for defendant's costs herein taxed at \$24.00.

Dated this 16th day of March, 1945.

PEIRSON M. HALL

Judge

Judgment entered Mar. 17, 1945. Docketed Mar. 17, 1945. C. O. Book 31, page 371. Edmund L. Smith, Clerk; by J. M. Horn, Deputy.

[Endorsed]: Filed Mar. 17, 1945. [103]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Imported Liquors Company, a partnership, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 17th day of March, 1945, in favor of the defendant and against the plaintiff, pursuant to the order of the Court granting judgment in favor of defendant on defendant's motion for summary judgment.

Dated: April 19, 1945.

EZRA Z. SHAPIRO and S. K. WALZER

and

BENJAMIN, LIEBERMAN & ELMORE,

By Aaron Elmore

Attorneys for Plaintiff and Appellant

[Endorsed]: Filed & Mailed Copy to Behrstock & Rudnick, Attys. for Deft. Apr. 20, 1945. [104]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 111 inclusive contain full, true and correct copies of Complaint; Answer; Interrogatories to Defendant under Rule 33; Answers to Interrogatories Presented by Plaintiff under Rule 33; Defendant's Notice of Motion for Summary Judgment with Statement of Grounds and Points and Authorities and Affidavits in Support thereof; Deposition of Howard S. Bernon and Exhibits thereto; Plaintiff's Notice of Motion for Summary Judgment with Points and Authorities and Affidavit in Support thereof; Defendant's Statement in Opposition to Motion for Summary Judgment with Supplemental Affidavit of Aaron Lilien; Affidavit of Joseph Sachs in Support of Plaintiff's Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment; Judgment; Notice of Appeal; Bond on Appeal; Designation of Record on Appeal and Statement of Points on Appeal and Designation of Appellee of Additional Records to be Included on Appeal which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$17.80 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 8 day of May, 1945.

[Seal]

EDMUND L. SMITH.

Clerk.

By Theodore Hocke

Chief Deputy Clerk.

[Endorsed]: No. 11057. United States Circuit Court of Appeals for the Ninth Circuit. Imported Liquors Company, a partnership, Appellant, vs. Los Angeles Liquor Company, Inc., a corporation, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed May 10, 1945.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11057

IMPORTED LIQUORS COMPANY, a partnership,
Plaintiff and Appellant,

vs.

LOS ANGELES LIQUOR COMPANY, INC., a corporation,

Defendant and Appellee.

DESIGNATION OF RECORD ON APPEAL AND
STATEMENT OF POINTS ON APPEAL

To the defendant and appellee above named and to the
Clerk of the above-entitled court:

* * * * *

STATEMENT OF POINTS ON APPEAL

A concise statement of the points on which plaintiff
and appellant intends to rely on the appeal is:

The Court erred in granting the motion of the defendant for summary judgment and in rendering and entering judgment thereon.

Dated: May 7, 1945.

EZRA Z. SHAPIRO and S. K. WALZER
and

BENJAMIN, LIEBERMAN & ELMORE.

By Aaron Elmore

Attorneys for Plaintiff and Appellant.

[Affidavit of Service by Mail.]

[Endorsed]: Filed May 10, 1945. Paul P. O'Brien,
Clerk.

No. 11057

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

IMPORTED LIQUORS COMPANY, a partnership,

Appellant,

vs.

LOS ANGELES LIQUOR COMPANY, INC., a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

FILED

JUL 30 1945

EZRA K. SHAPIRO

S. K. WALZER,

PAUL P. O'BRIEN,

CLERK

540 Guardian Building, Cleveland, Ohio,

BENJAMIN, LIEBERMAN & ELMORE,

1009 Commercial Exchange Building, Los Angeles, 14,

Attorneys for Appellant.

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No. 11057

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

IMPORTED LIQUORS COMPANY, a partnership,

Appellant,

vs.

LOS ANGELES LIQUOR COMPANY, INC., a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

I.

Preliminary Statement.

This is an appeal by plaintiff-appellant from a final judgment of the District Court of the United States, Southern District of California, Central Division, Hon. Peirson M. Hall, Judge, in favor of defendant-appellee, entered March 17, 1945, after the granting of the motion of defendant-appellee for summary judgment, under Rule 56 (c), Federal Rules of Civil Procedure (28 U. S. C. A., following section 723c), in a suit at law for damages for breach of contract.

II.

Basis of Jurisdiction.

(a) In the District Court.

Jurisdiction in the District Court lies in the diversity of citizenship provisions of 28 U. S. C. A., section 41, subdivision 1.

The complaint alleges that appellant is a partnership, all of whose partners are citizens of the State of Ohio; that appellee is a corporation organized under the laws of the State of California; that the amount in controversy exceeds \$3,000.00, exclusive of interest and costs [Transcript of Record, p. 2].

(b) In the Circuit Court.

Jurisdiction in the Circuit Court of Appeals exists by virtue of the provisions of 28 U. S. C. A., section 225, subdivision (a), first, granting to Circuit Courts of Appeal appellate jurisdiction to review by appeal final decisions in the District Court.

A Circuit Court of Appeals has jurisdiction on appeal from a judgment granting a defendant's motion for summary judgment:

Bee Machinery Co. v. Freeman, 131 Fed. (2d) 190
(C. C. A., Mass., 1942), affirmed 319 U. S. 448,
63 S. Ct. 1146.

The judgment from which the appeal is taken is a final judgment [Tr. pp. 78, 79] of a District Court, review of which is sought in the particular Circuit Court of Appeals embracing the state in which is located the District Court which rendered the judgment.

The judgment was entered on March 17, 1945 [Tr. p. 79], and the appeal was filed on April 20, 1945 [Tr. p. 80], well within the time authorized by law. (28 U. S. C. A., Sec. 230.)

III.

Statement of the Case.

The complaint [Tr. pp. 2-5] alleges that appellee, on June 12, 1944, agreed in writing to purchase from appellant, and appellant by its acceptance of said order sold 1400 cases of Portuguese Suarez brandy, F. O. B. an Atlantic port. appellee to pay for said merchandise by draft attached to the bills of lading, the gross purchase price of \$41.55 per case, less reserve for internal revenue tax and customs duty of \$27.63 per case, or a net purchase price of \$13.62 per case; that appellee made a part payment by check of \$1400.00; that on June 14, 1944, appellant received a telegram from appellee whereby appellee sought to cancel said agreement; that appellee stopped payment upon said check.

The complaint further alleges that appellant made available and segregated for appellee said merchandise in a public warehouse and appellant is ready, able, and willing to ship the same, or deliver the warehouse receipt thereon, to appellee.

Recovery is sought of the purchase price of \$19,488.00 plus expenses incurred in warehousing the merchandise, or in the alternative, if the Court should determine that appellant is not entitled to said relief, for the damages suffered for said breach of contract in the difference between the contract price of \$13.92 net per case and the market value of \$5.00 net per case, a total of \$12,488.00 plus warehousing charges.

The answer [Tr. pp. 6, 7] generally denies the allegations of the complaint; denies the execution of any agreement and alleges affirmatively that appellee "did make an offer to purchase certain brandy from [appellant] and mailed a check in the sum of \$1,400.00 to the [appellee]

together with said offer.” Another defense alleges that the complaint fails to state a claim upon which relief can be granted.

Each of the parties thereupon moved for summary judgment; the motion of appellant was denied; that of appellee was granted. Appellee’s motion was based upon affidavits and “upon the papers and documents on file.”

The court rule (Rule 56, subdivisions a, b, c and e, Rules of Civil Procedure) provides that on a motion for summary judgment, consideration shall be given to “the pleadings, depositions, and admissions on file, together with the affidavits.”

Appellee supported its motion by the affidavits of Aaron Lilien, Irven Rose and M. D. Weiner and the supplemental affidavit of Aaron Lilien.

Appellant resisted appellee’s motion (and supported its own motion) by the deposition of Howard S. Bernon, one of the partners of appellant; the affidavit of Mr. Bernon; the affidavit of Joseph Sachs; interrogatories submitted to appellant under Rule 33, Rules of Civil Procedure, and its answers thereto.

(a) APPELLEE’S SUPPORTING DOCUMENTS.

The affidavit of Irven Rose states that during the time involved he was a stockholder and secretary of appellee; that he signed the “order” referred to in the complaint on behalf of appellee; that he signed the deposit check of \$1,400.00; that he handed the order to M. D. Weiner, an agent of appellant, for transmittal to appellant; that he was advised by Mr. Weiner that shipment could probably be expected on confirmation of the order; that no confirmation was received; that it has always been the custom and usage in the trade that all orders should be

in writing, subject to acceptance by the seller, either by the written confirmation or by actual shipment of the merchandise [Tr. pp. 15, 16].

The affidavit of Aaron Lilien, president of appellee, states that in the morning or at noon of June 14, 1944, he advised Mr. Weiner that he desired to cancel the order of June 12, 1944, because Mr. Rose was severing his connections with appellee and also because the affiant was worried about the brandy passing California authorities; that Mr. Weiner advised him to wire his cancellation to appellant before the order was confirmed; that the affiant immediately telegraphed such cancellation and stopped payment on the check; that appellee did not receive any notice of acceptance of said order; that it is the general custom and usage in the liquor trade that all orders should be in writing and subject to acceptance by the seller either by written confirmation or actual shipment; that Mr. Weiner was never employed by appellee and had no authority to make any commitments on its behalf [Tr. pp. 17, 18].

The affidavit of M. D. Weiner states that he has been a sales agent for various companies; that he was such sales agent for appellant in connection with the present transaction; that he took the purchase order involved herein; that he advised appellee that said purchase order was subject to acceptance by appellant upon receipt of a properly executed order in writing, accompanied by a deposit check; that it has always been the custom and usage in the liquor trade that all orders taken by salesmen are subject to acceptance by the principal by written confirmation or actual shipment of the merchandise and that his dealings with appellee were on that basis; that he was never employed by appellee nor did he ever have any authority to make any commitments on its behalf; that on

June 14, 1944, Mr. Lilien advised the affiant that he desired to cancel said order and the affiant advised Mr. Lilien to wire his cancellation to appellant before confirmation because the affiant had no authority to bind his principal, either in taking the order or in cancellation [Tr. pp. 19, 20].

The supplemental affidavit of Aaron Lilien states that either at the end of May or the beginning of June, 1944, he received a telephone call from a person representing himself as Howard S. Bernon of Imported Liquors Company of Cleveland, Ohio; that Mr. Bernon told the affiant that he had a shipment of brandy which had been approved by the federal government and asked affiant whether that would satisfy the requirements contained in affiant's letter of May 20, 1944; that affiant answered that that was not sufficient because the brandy had to be passed also by California authorities; that Mr. Bernon asked the affiant how much brandy appellee could use and affiant stated that he could not answer until he had discussed it with other members of his firm, but that no consideration would be given to any order until he was convinced that the brandy would pass California authorities; that when he received the letter on June 5, 1944, from appellant he handed it to Mr. Weiner for the sole purpose of checking with California authorities; that the price of the brandy in question has not declined since June, 1944 [Tr. pp. 73, 74].

(b) APPELLANT'S OPPOSING DOCUMENTS.

Howard S. Bernon, a partner of appellant, testified at the deposition, at which both sides were represented by counsel, that he received a letter from appellant dated May 20, 1944 [Plaintiff's Exhibit E, Tr. pp. 58, 59, 60], dictated by M. D. Weiner on appellee's stationery, signed

by Aaron Lilien, inquiring about imported Portuguese brandies, setting forth California requirements, and concluding that:

“In view of the above, and if you still think that your Brandy will pass the necessary inspection, and upon receipt of advice from you, that you are willing to accept an order on this basis, we will be happy to hand one over to your Representative, Mr. Morris D. Weiner, who incidentally is familiar with our Portuguese Brandy problem and can further advise you, upon request.”

Mr. Bernon on June 5, 1944, placed a long distance telephone call to Mr. Lilien and discussed the matter with him; he informed Mr. Lilien that appellant had a shipment of brandy, originally 1500 cases, of which 1400 were left available for sale; they had been passed by the Food and Drug Administration of the United States Government and therefore could meet all the requirements of his (Lilien's) letter of May 20th; that he could send Lilien a photostat of this approval and that it would not be necessary for the merchandise to be re-examined in California by any federal or state authorities; that Mr. Lilien asked him to please not sell the merchandise to anybody else and to put it aside for him; that he, Bernon, thereupon agreed to accept Lilien's order and to put aside the 1400 cases and not to sell them to anybody else; that he thereupon hung up the 'phone, gave instructions to his agents not to sell that merchandise but to hold it as it was being sold to the Los Angeles Liquor Company; that he had a photostatic copy made of the certificate of the Food and Drug Administration of the United States [Tr. pp. 27, 43, 46].

On the same day, June 5, 1944, following this telephone conversation, Mr. Bernon mailed to appellant a letter as follows [Plaintiff's Exhibit C, Tr. p. 57]:

"Enclosed please find photostat of approval on a shipment of brandy which recently arrived in this country, by Federal Security Agency Food and Drug Inspection Station. Of these 1500 cases there are 1400 left and I will hold them for you for the next few days as per our telephone conversation of today. In view of the fact that this merchandise has been passed already it will not be necessary to submit it to the Federal Government for further inspection when it arrives in California. You certainly will not have any trouble on this lot if the State also makes an inspection.

"Please wire me as soon as you know whether or not you desire these 1400 cases Suarez Brandy. Incidentally, the strip stamps are already affixed and shipment can be made immediately."

The approval of the Federal Security Agency Food and Drug Inspection Station is dated May 15, 1944, and was made a part of the deposition as Plaintiff's Exhibit I [Tr. p. 64].

Mr. Bernon testified that this approval covered the brandy which was the subject of the telephone conversation [Tr. p. 27].

Following the letter of June 5, 1944, Mr. Bernon received a letter from M. D. Weiner acknowledging the receipt of the letter of June 5th addressed to appellee, the pertinent part of which is as follows [Plaintiff's Exhibit G, Tr. p. 62]:

"This will acknowledge receipt of your letter dated June 5, addressed to the Los Angeles Liquor Com-

pany and photostatic copy of the New York inspection No. 68041 pertaining to 1500 cases Suarez Portuguese Brandy which Mr. Aaron Lilien handed me to clear with the California Pure Food and Drug office. I will therefore wire you the following night letter 'Sold Los Angeles Liquor Company 1400 cases Suarez Brandy upon receipt of confirmation by wire or phone the Los Angeles Liquor Company will mail you 1400 dollars deposit as per your original instructions to me. advise.' M. D. Weiner"

Thereupon, on June 7, 1944, M. D. Weiner wired appellant as follows [Plaintiff's Exhibit H, Tr. p. 63]:

"IMPORTED LIQUORS CO— 1944 JUN 7 PM 9 13
RELET JUNE 5. SOLD LOS ANGELES LIQUOR COMPANY
1400 CASES SUAREZ PORTUGUESE BRANDY. UPON RECEIPT OF YOUR CONFIRMATION. BY WIRE OR PHONE
THE LOS ANGELES LIQUOR COMPANY WILL MAIL YOU
\$1400.00 DEPOSIT AS PER YOUR ORIGINAL INSTRUCTIONS
TO ME. ADVISE—

M. D. WEINER."

Mr. Bernon testified that after receipt of this wire he wired Mr. Weiner on June 9, 1944, asking for shipping instructions and confirming the sale [Tr. pp. 28, 29]. He testified that he was unable up to the time of the taking of the deposition to locate his copy of this wire but that Weiner acknowledged receipt of the wire by his telegram of June 9, 1944, addressed to appellant as follows, giving such shipping instructions [Plaintiff's Exhibit J, Tr. p. 65]:

"IMPORTED LIQUORS CO— 1944 JUN 9 AM 3 05
888 UNION COMMERCE BLDG CLEVE—
RECEIVED WIRE SHIP IN CARE OF FRANK P DOW CO
354 SOUTH SPRING ST LOS ANGELES CALIFORNIA PRO-

VIDING JUAREZ BRANDY LABEL AND PRICE HAS BEEN APPROVED BY WASHINGTON LOS ANGELES LIQUOR MAILING DEPOSIT AND PURCHASE ORDER FOR 1400 CASES JUAREZ BRANDY BASIS 41.55 PER CASE STOP I HAVE NOT YET RECEIVED AN ANSWER TO MY LETTER TO YOU DATED MAY 18TH WHEREIN I COMMENTED THAT 25 CENTS COMMISSION IS NOT SUFFICIENT AND REQUEST 50 CENTS PER CASE IN ORDER HAVE THE RECORD CLEAR SO THAT THERE CAN BE NO MISUNDERSTANDING BETWEEN US PLEASE CONFIRM BY WIRE OR LETTER AND OBLIGE—

M. D. WEINER."

On June 14, 1944 [Tr. p. 37], Mr. Bernon received by air mail, special delivery, Plaintiff's Exhibit A [Tr. p. 54], with check for \$1,400.00 as follows:

"LOS ANGELES LIQUOR CO INC.

Distributors of	3315 East Vernon Avenue
Wines and Liquors	Los Angeles 11, California
	Telephone KImball 7178

June 12, 1944

Imported Liquors Company,
888 Union Commerce Building
Cleveland, 14, Ohio, U. S. A.

Gentlemen, Purchase Order

"This will be your authority to ship 1400 cases Suarez brandy at \$41.55 per case F.O.B. Atlantic Port, draft attached to bill of lading less \$1.00 per case deposit which is herein enclosed (\$1,400.00) less Internal Revenue Taxes, Duties and additional Federal Tax.

"Goods to be shipped in bond in care of the Frank P. Dow Co., 354 So. Spring St., Los Angeles, California.

"Please furnish the Frank P. Dow Co., your Federal Import licenses number in the event they may require it and also please mail them the bill of lading and oblige.

Yours very truly,

LOS ANGELES LIQUOR CO. INC.,

Irven Rose

per Irven Rose

Air Mail—Special Delivery

Enclosure (\$1,400.00 Check Deposit)

Our Bank is Bank of America, Vernon Branch,
3801 Santa Fe Ave.

Our California State Import license is L-136 G.

[Written]: O. K. M. D. Weiner [76]"

The check is Exhibit B and appears in the record at pages 55, 56.

On or about June 13, 1944, the trade was made aware by the War Production Board of the fact that there was to be a "liquor holiday" under the terms of which distillers in the United States would be allowed to produce gin and whiskey (the transaction at bar involved the purchase of brandy); the effect of this so-called liquor holiday was to reduce the marketability of the type of imported brandy appellant had sold to appellee; that brandies had been used for the past two years more or less as a substitute for domestic whiskies which were not available; that the market value of brandy decreased as a result of the liquor holiday [Tr. pp. 31, 32, 71].

Following the receipt of the "purchase order" dated June 12, 1944, and later in the same day Mr. Bernon received the wire of appellee dated June 14, 1944, pur-

porting to cancel the "purchase order," Plaintiff's Exhibit A, reading as follows [Plaintiff's Exhibit D, Tr. p. 58]:

"IMPORTED LIQUOR CO—

1944 JUN 14 PM 4 25

888 UNION COMMERCE BLDG CLEVE—

IRVEN ROSE WHO PLACED ORDER WITH YOU FOR
1400 CASES FUAREZ BRANDY SOLD HIS INTEREST IN
LOS ANGELES LIQUOR COMPANY NO LONGER WITH US
PLEASE CANCEL ORDER AND RETURN DEPOSIT CHECK
AND OBLIGE CONFIRM—

1400.

AARON LILIAN."

Mr. Bernon testified that he made some effort to get ahold of Weiner; that he was out of town for a while [Tr. pp. 38, 39]; the bank notified him on June 26th [Tr. p. 56] that the check was dishonored and that on June 29, 1944, he wrote to the appellee rejecting its purported cancellation and insisting on its completion of the contract [Plaintiff's Exhibit F, Tr. pp. 60, 61].

He testified that he caused said brandy purchased by appellant to be segregated in the Rockefeller Center Warehouses, Inc., in New York City and set aside for appellee; that appellant has at all times since June 5, 1944, been and still is ready to deliver the same to appellee [Tr. pp. 33, 34, 36, 39, 42]. The warehouse receipt was introduced in evidence as Defendant's Exhibit 1 [Tr. p. 66].

The witness testified that the custom of confirming the acceptance of an agent's order was not followed in the present case for the reason that he agreed with Lilien in the telephone conversation of June 5, 1944, to accept his order and put aside 1400 cases for appellee and not sell the same to anybody else; that the "deal" was made on June 5th and that the only thing holding up the delivery was whether or not he could produce a photostatic copy of approval from the Food and Drug Administration;

that he sent him a photostat and asked him to wire; that instead "he had his man Weiner wire me" [Tr. pp. 45, 46, 47].

With respect to Weiner's agency, Mr. Bernon testified that it has been the practice in the liquor industry for the last few years for agents to represent sellers and buyers at the same time due to the fact that buyers have been unable to obtain enough merchandise to satisfy their needs; in the present transaction Weiner was acting as the agent of the appellant as well as appellee [Tr. pp. 45, 40].

Pursuant to Rule 33, Rules of Civil Procedure, appellant submitted to appellee interrogatories [Tr. pp. 8, 9] which appellee answered as required [Tr. pp. 10, 11]. The substance of the interrogatories and answers is that Irven Rose, who sent the wire of cancellation [Tr. p. 58], was, at all of the times involved, a stockholder and secretary of appellee, in charge of sales, and authorized to make purchases of liquor on its behalf. Appellee was asked if there was any reason for endeavoring to cancel the purchase order dated June 12, 1944, by the telegram dated June 14, 1944, other than the reason stated in the telegram (that Irven Rose sold his interest in the firm). Appellee's answer was:

"There was still some doubt in our minds whether there would not be some trouble about passing the Brandy with the California authorities, and I decided that it was too much Brandy to order, in view of the fact that Mr. Rose was leaving the Company. Aaron Lilien" [Tr. p. 11].

In passing we call the attention of the Court to the fact that neither in the answer, nor in any of appellee's affidavits, is the contention made that the brandy involved did not or would not pass California authorities.

Appellant filed an affidavit of Howard Bernon, which dealt with his telephone conversation with Mr. Lilien, the "liquor holiday," the depreciation in market value of the brandy after June 12, 1944, and the connection of Mr. Weiner to the parties [Tr. pp. 69-72].

The affidavit of Joseph Sachs, filed by appellant, dealt at length with market values of brandy [Tr. pp. 75-78], substantiating the allegations of the complaint and the testimony of Mr. Bernon.

Specification of Error.

The District Court erred in granting the motion of the appellee for summary judgment and in rendering and entering judgment thereon.

Argument.

The Court erred in granting appellee's motion and rendering judgment for appellee for the following reasons:

1. The record shows a binding agreement between the parties, which the appellee had no legal right to "cancel."
2. In any event, the showing made by appellee was not such that, within the purview of the summary judgment rule, the Court should have granted the motion, but on the contrary, should have denied it as a matter of law.

Rule 56, subdivision (b), Rules of Civil Procedure, provides that a party against whom a claim is asserted may at any time move, with or without supporting affidavits, for a summary judgment.

Rule 56, subdivision (c), provides that:

"The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except

as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”

The summary judgment rule has been the subject of numerous decisions. Some pertinent rulings, particularly applicable to the case at bar, follow:

It was not the intention of Rule 56 that a case should be tried by affidavit as a substitute for trial in open court and that the parties be deprived of the opportunity for cross-examination:

Chemical Foundation, Inc., v. Universal Cyclops Steel Corp. (D. C., Pa.), 2 Fed. R. Dec. 283;

U. S. v. Newbury Mfg. Co. (D. C. Mass), 1 Fed R. Dec. 718.

The summary judgment statute is drastic and its purpose is not to provide a substitute for existing methods in the trial of issues of fact; it should be used with caution.

Gibson v. De LaSalle Institute, 66 Cal. App. (2d) 609 at 617, 152 Pac. (2d) 774;

Walsh v. Walsh, 18 Cal. (2d) 439 at 444, 116 Pac. (2d) 62.

A defendant is not entitled to a summary judgment unless the facts conceded show the right to a judgment with such clarity as to leave no room for controversy and that plaintiff would not be entitled to recover under any circumstances.

Clair v. Sears Roebuck & Co. (D. C., Mo.), 34 Fed. Supp. 559;

Dairy Engineering Corp. v. De-Raef Corp. (D. C., Mo.), 1 Fed. R. Dec. 679.

The burden of proof on a motion for summary judgment by a defendant requires the defendant to show by uncontradicted facts that as a matter of law there is no issue as to any material facts.

Ramsouer v. Midland Valley R. Co. (D. C., Ark.),
44 Fed. Supp. 523.

Summary judgment should be denied where general issues as to material facts are raised.

Hummel v. Wells Petroleum Co. (C. C. A. 7), 111
Fed. (2d) 883;

Vassardakis v. Parish (D. C., N. Y.), 36 Fed.
Supp. 1002;

Boerner v. U. S. (D. C., N. Y.), 26 Fed. Supp.
769;

Ottinger v. General Motor Corp. (D. C., N. Y.),
27 Fed. Supp. 508.

On appeal from a judgment granting a defendant's motion for summary judgment, the Circuit Court of Appeals must give to plaintiff the benefit of every doubt:

Weisser v. Mursam Shoe Corp. (C. C. A., N. Y.,
1942), 127 Fed. (2d) 344, 145 A. L. R. 467;

Walling v. Fairmont Creamery Co. (C. C. A.,
Neb., 1943), 139 Fed. (2d) 318.

In the light of the foregoing rules of construction and in view of the many material issues of fact on which there was a conflict, we submit that the motion of the appellee should have been denied.

The principal issues in the case were whether a binding agreement had been entered into, as contended by appellant, or whether the transaction constituted a mere un-

accepted offer, as urged by appellee, and whether appellee had the right to cancel. Included within these issues were the questions (1) whether there was a custom in the trade that orders should be confirmed or, assuming there was such custom, whether the parties acted without reference to or dispensed with such custom; (2) whether Weiner acted in the transaction on behalf of appellant only or was the agent of both parties; (3) the reasons for the attempted cancellation by appellee; and (4) market value of the brandy.

We submit that, aside from the conflicts of fact on these issues, the telephone conversation, letters and telegrams constitute a binding contract which appellant is entitled to enforce.

The negotiations were initiated by appellee's inquiry in his letter of May 20, 1944 [Tr. p. 58]. The long distance telephone call of June 5, 1944, which followed, concluded in a verbal agreement subject only to appellant's producing a photostatic copy of approval of the brandy by the Food and Drug Administration [Tr. pp. 47, 46, 27]. Appellant immediately instructed its agent to put aside and hold the brandy for appellee [Tr. pp. 42, 43, 37]. This was before the announcement of the liquor holiday by the War Production Board [Tr. p. 31], and at a time when appellant might have sold the brandy elsewhere, but refrained from doing so on appellee's request to hold it for appellee [Tr. p. 43].

Appellant confirmed the telephone conversation by its letter of the same day, June 5, 1944 [Tr. p. 57], enclosing the photostat, requesting appellee's wire of approval. Appellee then turned over this letter to Weiner who replied by letter on June 7, 1944 [Tr. p. 62], stating that Lilien handed him the Food and Drug Administration photostat

of approval to clear with the California authorities and that he would wire a night letter of approval to appellant. On the same day he did wire to appellant stating that he had sold 1400 cases of the brandy to the Los Angeles Liquor Company and that upon receipt of confirmation appellee would send the deposit of \$1400.00 [Tr. p. 53]. Appellant on receipt of this night letter did immediately, on June 9, 1944 [Tr. p. 40], wire, acknowledging the order and asking for shipping instructions. On the same day, June 9, 1944, Weiner wired again acknowledging the receipt of appellant's wire and gave appellant shipping instructions [Tr. p. 65].

Then followed the "purchase order" by air mail letter, special delivery, dated June 12, 1944, from appellee to appellant, with enclosure of check for \$1400.00 deposit [Tr. pp. 54, 55, 56]. This latter document is absolutely unconditional.

Lastly, we have, two days later, on June 14, 1944, appellee's wire to appellant purporting to cancel [Tr. p. 58], for a reason which was hardly consistent with the additional excuse given in the answer to the interrogatories [Tr. p. 11], or with the announcement of the liquor holiday by the War Production Board and consequent decline in the price of brandy.

These facts show that a meeting of the minds occurred in the telephone conversation of June 5, 1944, and that the agreement of the parties was completed and confirmed in writing by the letter and telegram of Weiner, whom appellee used, both dated June 7th. Weiner's wire of June 9, 1944, acknowledging appellant's wire of June 9, 1944, and giving shipping instructions, further confirmed the agreement. All of these communications by Weiner, who, as stated, was used by appellee, were still further confirmed by the appellee's air mail special delivery letter

denominated "purchase order" of June 12, 1944, accompanied by part payment of \$1400.00. Nothing remained to be done by appellant and nothing more was asked of appellant, except to ship the brandy, preparation for which had already been attended to [Tr. p. 39]. This was intercepted by appellee's wire of June 14, 1944, purporting to cancel and the brandy continued to remain in the warehouse segregated for appellee [Tr. p. 36].

Appellee's theory that the document of June 12, 1944, was nothing more than a mere offer, after all of the preceding letters, telegrams and the telephone conversation, does not make sense.

We believe it clear that all of the essential elements of a binding contract were present. (*Civil Code of California*, Secs. 1549, 1550.) While all of the details of the contract are, in our opinion, present in the telegrams and letters, it should be remembered that the note or memorandum required under the statute of frauds to render a contract enforceable need not contain all of the details of an agreement between the parties, but is sufficient if it contains the essential elements.

Gibson v. De LaSalle Institute, 66 Cal. App. (2d) 609 at 627, 152 Pac. (2d) 774 (and numerous cases from other states there cited).

It is a court's duty to so interpret a contract "as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."

Civil Code of California, Sec. 1636.

"The whole of a contract is to be taken together so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."

Civil Code of California, Sec. 1641.

“A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties.”

Civil Code of California, Sec. 1643.

A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates. For this purpose it is proper to consider the relations between the parties, the work to be done and the correspondence relating up to the execution of the agreement.

Civil Code of California, Sec. 1647;

Code of Civil Procedure of California, Secs. 1856, 1860;

Williams v. Ashhurst Oil etc. Co., 144 Cal. 619, 78 Pac. 28;

Payne v. Neubal, 155 Cal. 46, 99 Pac. 476.

Appellee neither pleaded nor contended in any affidavit, or otherwise, that it had any of the statutory reasons for extinguishment of an enforceable contract.

Civil Code of California, Sec. 1682 *et seq.*

The recovery sought is in accordance with standard rules: The purchase price fixed by the agreement plus warehousing charges, or in the alternative, if the Court should determine that appellant is not entitled to the full contract price, damages equal to the difference between the contract price and the market value, plus warehousing charges.

Section 1783, Civil Code of California (which is section 63 of the Uniform Sales Act), provides for the recovery by a seller of the purchase price where the buyer wrongfully neglects or refuses to pay for the goods.

Section 1784, Civil Code of California, provides that if the buyer wrongfully neglects or refuses to accept and pay for the goods the seller may maintain an action for damage for non-acceptance, the measure of which is the estimated loss directly and naturally resulting, in the ordinary course of events: that where there is an available market, the measure, in the absence of special circumstances, showing greater damage, is the difference between the contract price and the market or current price when the goods ought to have been accepted.

In *Porter v. Gibson*, 25 Advance California Reports 499 at 507 (California Supreme Court, Dec., 1944), 154 Pac. (2d) 703, we find the following:

“One of the rights of a vendee (vendor) of personal property under a contract for the sale of such property, upon the refusal of the vendee to take the property and pay the agreed price, is ‘Standing on the sale the vendor may retain the property for the vendee and sue for the purchase price.’ (*Cuthill v. Peabody*, 19 Cal. App. 304, 308 (125 P. 926).)”

To the same effect see also:

47 *Am. Jur.* 723;

22 *Cal. Jur.* 1067, 1083;

Union Liquors, Inc., v. Finkel, 44 Cal. App. (2d) 706.

Conclusion.

The clear preponderance of the facts and the law on all phases of this case are with the appellant. If the case was to have been finally decided on mutual summary judgment motions, the decision thereon should have been for appellant, not appellee. Certainly, all doubts in the matter should have been resolved in favor of a trial on the merits with opportunity to each party to present witnesses and to cross-examine in open court. The judgment should be reversed.

Respectfully submitted,

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Attorneys for Appellant.

No. 11057

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

IMPORTED LIQUORS COMPANY, a Partnership.

Appellant,

vs.

LOS ANGELES LIQUOR COMPANY, INC., a Corporation,

Appellee.

APPELLEE'S REPLY BRIEF.

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FILED

SEP 1 - 1945

PAUL P. O'BRIEN,
CLERK

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No. 11057

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

IMPORTED LIQUORS COMPANY, a Partnership,

Appellant,

vs.

LOS ANGELES LIQUOR COMPANY, INC., a Corporation,

Appellee.

APPELLEE'S REPLY BRIEF.

I.

Statement of Case.

This is an appeal from a judgment entered on an order granting defendant's motion for summary judgment after both parties filed motion for summary judgment. The action is based upon a breach by the buyer of a contract for sale of brandy.

The facts of this case stated briefly are as follows: After preliminary negotiations between the parties, consisting of a letter of May 20, 1944 [Plff's Ex. E: Tr. p. 58], a telephone conversation between appellant and Mr. Lilien, President of appellee corporation [Tr. p. 27] and a letter from appellant to appellee dated June 5, 1944 [Plff's Ex. C; Tr. p. 57], on June 12, 1944, appellee handed an order to appellant's agent M. D. Weiner, together with a deposit check in the sum of \$1400.00.

[Plff's Ex. "A"; Tr. p. 54.] The agent told appellee's officer that the order was subject to acceptance by appellant upon receipt of order and check, and transmitted the order and check to appellant, who received it on June 14, 1944. A few hours after receipt of the order appellant received a wire from appellee cancelling the order and asking for a return of the check. After receipt of the order and cancellation, appellant did not communicate with appellee until its letter of June 29, 1945 [Plff's Ex. F; Tr. p. 60], in which appellant demanded that the appellee accept the merchandise.

Appellant admits that M. D. Weiner was its agent, but contends that he was also appellee's agent in the transaction, and thereupon offers into evidence in its deposition, over appellee's objection, communications from M. D. Weiner to appellant, consisting of a letter of June 7, 1944 [Plff's Ex. G; Tr. p. 62] and two telegrams dated June 7, 1944 and June 9, 1944 [Plff's Exs. H and J; Tr. p. 63], the gist of which is to advise appellant that Mr. Weiner had sold appellee 1400 cases of brandy, and that appellee would forward a purchase order and deposit check. Appellant further states that it sent a wire to Mr. Weiner confirming his telegram of June 7th, but neither the original nor a copy of the wire is produced.

Appellant also offered evidence and affidavits concerning damages sustained which are not pertinent to this appeal, because the only specification of error is that the Court erred in granting appellee's motion for summary judgment, and the question of damages is not raised therein.

II.

A Summary Judgment Is Proper When Only a Question of Law Is Presented, and the Moving Party Would Be Entitled to a Directed Verdict if the Case Were Tried.

Appellee has no argument with the law cited in appellant's brief to the effect that a summary judgment is proper only when there is no genuine issue of fact, and when it appears that the moving party would be entitled to a judgment as a matter of law. However, it must be pointed out that the issue of fact must be "genuine" and "material" and must be raised by evidence which would be admissible at the trial; and if reliance is placed upon a written document, sworn or certified copies of the documents must be produced or their absence explained. (*Rule 56, Sub. (c) and (e), Federal Rules of Civil Procedure.*)

Thus it is stated in 18 *Hughes Federal Practice* 399: "Under 56(c) the affidavit must set forth evidentiary facts, not ultimate facts or mere conclusions of law." And in *Piantadosi v. Loews, Inc.* (C. C. A. Cal. 1943), 137 F. (2d) 534, which was an action for infringement of copyright, the Court in affirming the lower Court's summary judgment for plaintiff stated at page 536:

"Rule 56(e) of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c declares with respect to summary judgments that: 'Supporting and opposing affidavits shall be made on personal knowledge, shall set forth *such facts as would be admissible in evidence* and shall show affirmatively that the affiant is competent to testify to the matters stated therein.' Under this rule mere denials unaccompanied by any facts which would be admissible in evidence at a hearing are not sufficient to raise a genuine issue of fact."

In *Seward v. Nissen*, D. C. Del. 1943, 2 F. R. D. 545, the Court held that on a motion for a summary judgment hearsay statements in affidavits must be disregarded. And in *Walling v. Fairmont Creamery Co.*, 139 F. (2d) 318, the Court states at page 322:

“When written documents are relied on they must be exhibited in full. The statement of the substance of written instruments or of affiant’s interpretation of them or of mere conclusions of law or restatements of allegations of the pleadings are not sufficient.”

That same conclusion was reached in *Gardenswartz v. Equitable Life Assur. Soc.*, 23 Cal. App. 2d Supp. 745, 68 Pac. (2d) 322, in passing on the California summary judgment statute which is substantially the same as the Federal Statute; and in *Cowan Oil Refining Co. v. Miley Petroleum Co.*, 112 Cal. App. Supp. 773, 295 Pac. 504, the Court in sustaining a summary judgment and holding that the opposing affidavit was insufficient, stated at page 780:

“We think the statements quoted are insufficient to defeat the motion for judgment under section 831 D. They are manifestly mere conclusions of law, or, putting the most favorable construction upon them, they are perhaps conclusions of fact or ultimate facts. Neither conclusions of law nor conclusions of fact, nor so-called ultimate facts, are sufficient to satisfy the requirements of this section.”

In this connection, the affidavit of Howard Bernon [Tr. p. 69], is so replete with conclusions of law and fact rather than material evidentiary matter, that no weight can possibly be given to it by the Court.

The foregoing are the pertinent rules to be borne in mind in passing upon the documents presented on a motion for summary judgment, and appellee will present his arguments in support of the judgment in this case in the light of those rules.

III.

An Order for Goods Is Merely an Offer to Buy and Is Revocable at Any Time Before Acceptance or Approval Is Communicated to the Offeror.

Paragraph III appellant's complaint [Tr. p. 2], sets forth the transaction between the parties as follows:

"On June 12, 1944 the defendant by his non-cancellable order, agreed in writing to purchase from the plaintiff *and, by its acceptance of said order the plaintiff sold to the defendant* 1400 cases of Portuguese Suarez Brandy upon the following terms: Shipment to be made F.O.B. Atlantic Port, the defendant to pay for said merchandise upon draft, attached to the bills of lading, at the purchase price of Forty-one Dollars and Fifty-five Cents (\$41.55) per case, less reserve for Internal Revenue Taxes and Customs Duty, at the rate of Twenty-seven Dollars and Sixty-three Cents (\$27.63) per case, payable by the defendant, or at a net purchase price of Thirteen Dollars and Ninety-two Cents (\$13.92) per case. As further consideration in and for said agreement of purchase and sale the defendant issued and delivered to the plaintiff its check in the sum of Fourteen Hundred Dollars (\$1400.00) as a deposit thereunder."

Paragraph IV of appellant's complaint alleges the fact that the telegram of cancellation [Pliff's Ex. D; Tr. p. 58], was received by appellant on June 14, 1944, and payment was stopped on the deposit check.

Thus appellant's cause of action, according to his own complaint is based upon the purchase order by appellee of June 12, 1944 [Pliff's Ex. A; Tr. p. 54], and an acceptance of said order by appellant.

Here it would be well to make two observations: First, the description of the order as "non-cancellable" in the complaint is purely a conclusion of law to be drawn by the Court from the facts, and therefore not properly a part of the pleading. Secondly, if the allegations in the complaint regarding the transactions between the parties were not correct, appellant had plenty of opportunity to amend its complaint, but failed to make any request therefor.

Appellee's answer [Tr. p. 6] admits the order and check and the cancellation thereof, but denies that there was any agreement of sale between the parties.

It is conceded by the appellant [Tr. p. 30] that the first communication by him to appellee after receipt of the order was the letter of June 29, 1944. [Pliff's Ex. F; Tr. p. 60.] In this letter he advised appellee that the order had been accepted and demanded that he take the merchandise. This was 15 days after receipt of the order and cancellation.

It should also be noted at this point that both the affidavits of Irven Rose, who placed the order [Tr. pp. 15 and 16] and M. D. Weiner, who took the order [Tr. p. 19], state that Mr. Weiner told Mr. Rose that the order was subject to confirmation by appellant and there is nothing in either the affidavit or deposition of the appellant to indicate that Mr. Weiner was authorized to bind appellant by an acceptance of the order, or if he was, that appellee was ever apprised of that fact.

The question, therefore, is: may a person who places an order for goods revoke that order before acceptance thereof is communicated to him? On that point there is abundant and uniform authority in the affirmative:

In 55 *C. J.* 81 it is stated as follows:

“An order for goods or chattels until acceptance is merely an offer or proposal to buy, particularly where the order is given to an agent of the seller, and is made subject to the seller’s approval or acceptance. It is merely an offer to contract and not a contract to sell or purchase.”

Section 1586 of the Civil Code of the State of California states:

“A proposal may be revoked at any time before its acceptance is communicated to the proposer, but not afterward.”

And in 6 *Cal. Jur.* 52 it is stated:

“Thus an order for goods is merely an offer or proposal to buy, which is revocable at any time before acceptance of it, or before any reply or notice of the receipt or acceptance of the order is given or communicated to the person giving the order.”

Harvey v. Duffy, et al., 99 *Cal.* 401, 33 *Pac.* 897, a leading case on this subject and widely quoted and approved, is practically on all fours with the instant case. That case was an action for damages for failure to accept goods. Defendant inquired of plaintiff by letter regarding certain radiators. Plaintiff sent their sales representative to defendant, who gave the salesman an order for radiators. Upon receipt of the order plaintiff commenced to manufacture the radiators without advising defendant that they had accepted the order. Two weeks

later defendant wired a cancellation of the order. Plaintiff contended that the salesman had authority to sell and therefore the order became binding when he received it. The Court in affirming a judgment for defendant, and after pointing out that the only knowledge defendant had of the salesman's authority was his authority to quote prices and receive the order for transmission to plaintiff, stated at pages 405-406:

"But assuming he was authorized to sell, he certainly, so far as the record shows, never exercised any such authority, but simply contented himself with receiving the order and transmitting it to the Company, by whom it was never accepted, nor was anything said or done by it from which an acceptance could be inferred.

"In fact, neither the defendants, nor anyone for them, ever received any reply or notice whatever of the receipt or acceptance of the order either from the Company or Harvey, or anyone else, until after they had revoked it. *As the order was merely an offer or proposal to buy, it was revocable by the defendants at any time before acceptance, and, as there was no acceptance of it by the Company before it was revoked, it follows that there was no contract either of manufacture or of sale.*" (Italics by Appellee.)

In the case of *Baird v. Pratt*, 8th C. C. A. 148 F, 825 the seller brought an action against the buyer on a written order for purchase of goods. The order had been cancelled before acceptance was communicated to the buyer. The salesman who took the order signed his name on the left hand corner, but it was conceded that he had no authority to accept the order and bind the seller. It was contended by the plaintiff that the order was an executory contract for purchase of merchandise. The trial jury held for plaintiff, and the Circuit Court of Appeals

in reversing the judgment held that the order was a mere offer subject to acceptance by the seller and revocable by the buyer at any time before acceptance was communicated to him, and that the lower Court should have given a directed verdict for defendant.

The above law is also followed in the State of Ohio, where appellant resides. In 9 *Ohio Jurisprudence* 266, it is stated:

"An order or offer to purchase goods subject to approval of the seller does not create a contract until notice of acceptance is communicated."

And in *Durant-Dort-Carnegie Co. v. Karth*, 14 O. Cir. Ct. N. S. 341-33 Oh. Cir. Ct. 343, the Court states:

"But it is a clear rule of law sustained by abundant authority that an order or offer to purchase goods under a written or printed order is a mere offer, and before notice of acceptance may be revoked by the party making the order or signing the order."

In view of the foregoing it is submitted that appellee was within its rights to cancel the order when it did, and in doing so perpetrated no breach of contract.

But appellant, in his brief and in the testimony presented now contends that appellee's purchase order [Plff's Ex. A; Tr. p. 54], was only a confirmation of a contract which had previously been concluded between the parties, and that therefore the cancellation was of no force and effect. Therefore, bearing in mind the rules concerning the nature of a summary judgment and the rules applicable to evidence submitted on a motion for a summary judgment, appellee will consider all of the evidence produced by appellant to show that this contention of appellant is entirely without merit.

IV.

The Evidence Presented by Appellant Does Not Show the Formation of a Contract.

The law regarding the formation of a contract is almost axiomatic. For the purpose of this argument it is sufficient to say that the simple essentials to the formation of a contract are: proper parties, legal subject matter, consideration, and consent or a meeting of the minds. In 6 *Cal. Jur.* 41 it is stated:

“Assent of at least two minds *to each and all of the essentials* of the agreement is required; and it is only upon evidence of such assent that the law enforces the terms of a contract or gives a remedy for a breach of it.” (Italics ours.)

Consent is manifested by an offer or proposal by one party and an absolute and unqualified acceptance of the terms of the offer by the other. (6 *Cal. Jur.* 62.)

In this connection it is to be noted that while preliminary negotiation may ultimately blossom into a binding contract, yet there is no enforceable contract until the minds of the parties have finally met and there has been an offer and unqualified acceptance at least of all the essential terms and elements of the contract. (6 *Cal. Jur.* 24; *Toms. v. Hellman*, 115 Cal. App. 74, 1 Pac. (2d) 31; *Kerr Glass Mfg. Corp. v. Arden Sales Corp.*, 61 Cal. App. (2d) 55, 141 Pac. (2d) 938.)

It is the contention of appellee that applying the above rules of law to all of the evidence properly submitted by appellant, it can be said as a matter of law that no contract was ever consummated between the parties to this suit. In arguing this contention appellee will analyze each communication written or oral, testified to or produced by

appellant in chronological order, but will group them in two groups for the sake of convenience. The first group will consist of communications directly between appellant and appellee; and the second group will consist of communications between appellant and M. D. Weiner, the agent.

A. COMMUNICATIONS DIRECTLY BETWEEN PARTIES.

(1) *Letter of May 20, 1944, From Appellee to Appellant.*
[Plff's Ex. E; Tr. p. 58.]

This letter is properly characterized on page 17 of appellant's opening brief as a letter of inquiry solely. It discloses the parties to the transaction and makes an inquiry regarding the subject matter of the transaction.

(2) *Telephone Conversation Between Appellant and Mr. Lilien, President of Appellee, on June 5, 1944* [Tr. pp. 27, 43, 46] *and Letter of June 5, 1944, From Appellant to Appellee.* [Plff's Ex. C; Tr. p. 57.]

These two communications will be considered together, because the letter purports to contain a recital of the telephone conversation. It is claimed by appellant (App. Op. Br. pp. 17 and 18) that the telephone conversation concluded in a "verbal agreement" and a "meeting of minds." This is directly contradicted by appellant's own letter of June 5th, which was purportedly written after the conversation and in which he states in the last paragraph thereof, "Please wire me as soon as you know whether or not you desire these 1400 cases Suarez Brandy." How could there possibly have been any meeting of minds when one of the parties didn't even know whether he wanted to enter into any transaction concerning the subject matter ?

However, to resolve any possible doubt in appellant's favor, let us examine every shred of evidence presented by him concerning the above telephone conversation and arrive at its legal effect. That evidence is as follows:

In his deposition appellant testified [Tr. p. 27]:

"Q. What if anything did you do with reference to that letter? A. Well, first of all I had a long distance telephone call put in to Mr. Aaron Lilien in Los Angeles, in which I discussed this letter. I told him we had a shipment of brandy of which there were originally 1500 cases, of which there was 1400 left available for sale. That it had been passed by the Food and Drug Administration of the United States Government, and, therefore, could meet all the requirements of his letter of May 20th. I further told him that I could send him a photostat of this, and that it would not be necessary for the merchandise to be reexamined in California by any Federal or State authorities that they had. I then, having hung up the 'phone, had a photostat made and wrote him a letter in which I confirmed our telephone conversation."

[Tr. p. 43]:

"Q. The 8th of June 1944? A. Not only that, when I talked to Lilien on the 5th he asked me to please, not to sell the merchandise to anybody else; to put it aside for him * * *"

[Tr. p. 46]:

"Q. I mean it is the case in this instance too? A.. No, it was not because I agreed with Lilien on the phone on the morning or afternoon of June 5th to accept his order, and agreed to put aside 1400 cases and not sell it to anybody else."

[Tr. p. 48]:

“Q. Did you issue any instructions to Weiner that any order must be noncancellable and a check deposited, that the company check must accompany the order ? A. All I can remember of the case—I am speaking again from memory now, because I don’t have any papers in front of me that would refresh my memory—I remember stating to Lilien on the telephone on June 5th, to send me in a check as evidence of good faith.”

In addition to the above testimony the letter of June 5th, 1944 [Plff’s Ex. C; Tr. p. 57], is all the evidence by appellant regarding that conversation.

It is immediately evident that not one single word was mentioned between the parties during that conversation, or in the letter, concerning one of the most vital and essential elements of any contract to purchase goods, to-wit: the consideration or price to be paid therefor. The most that can be said for the conversation, giving appellant every benefit of doubt, is that the parties agreed upon the quantity of goods to be involved in the transaction, but that up to this point, there being no mention as yet of the price to be paid for the goods, the entire transaction was still in the process of preliminary negotiation. It is noteworthy that, although a deposit check is mentioned, it does not even appear in what sum the check should be.

(3) *The Purchase Order of June 12, 1944.*

[Plff’s Ex. A; Tr. p. 54.]

This is the first document which sets forth all the terms of the proposed contract. It supplies that essential of a contract which was entirely missing in previous communications between the parties, to-wit, the price of the goods.

But, as pointed out in prior arguments in this brief, it constitutes only an offer; and until there has been a communication by the offeree of a consent thereto, it cannot constitute an enforceable contract. Thus, granting, for the sake of argument, that the minds of the parties had previously met upon the parties to the transaction, and the subject matter or goods involved in the transaction, at this point there has not yet been a meeting of minds as to the consideration to be paid. This document could not possibly constitute a confirmation or acceptance, because it contains a condition, the price, which has not hitherto appeared in the negotiations between the parties.

(4) *The Telegram of Cancellation of June 14, 1944.*
[Plff's Ex. D; Tr. p. 58.]

This document is a complete cancellation of the offer contained in the Purchase Order above, and was received by the appellant a few hours after receipt of the order and before appellant had even deposited the check which accompanied the order. Appellant concedes that at the time he received this telegram he had not had time to communicate any acceptance of the order to appellee; and as pointed out elsewhere in this brief, an offer may be revoked at any time before acceptance is communicated to the offeror. Therefore, at this point the transaction was lawfully concluded without formation of any contract.

It might be noted that so long as a party has the right to cancel an offer, the reason or lack of reason for the cancellation is entirely immaterial and without legal effect.

Section 1682, *et seq.*, Civil Code of California, cited by appellant, concerns rescission and cancellation of contracts and is not applicable in the face of the contention that no contract was ever entered into.

(5) *The Letter of June 29, 1944, From Appellant to Appellee.* [Plff's Ex. F; Tr. pp. 60-61.]

If not for the cancellation of the order of June 12, 1944, this letter might have constituted an acceptance of the order, if it were held to be within a reasonable time. However, in view of the fact that it was mailed 15 days after receipt of the telegram of cancellation, it cannot possibly have any effect upon the question of whether a contract was created between the parties.

B. COMMUNICATIONS BETWEEN APPELLANT AND M.
D. WEINER, THE AGENT.

Before proceeding to analyze the communications between appellant and M. D. Weiner, the appellee desires to make the point that these communications, consisting of a letter and several telegrams, are inadmissible against appellee because as to the appellee they are purely hearsay and self serving.

It is a well settled principle of law that a person is not bound by the acts or declarations of another, unless that other is an agent of the person sought to be bound, and that evidence of such acts or omissions are not admissible in evidence unless at least *prima facie* evidence of the agency is first presented.

10 *Cal. Jur.* 322;

California Code of Civil Procedure. Sec. 1870,
Subd. 5;

Harris v. Miller, 196 Cal. 8, 235 Pac. 981;

Sveanson v. Siem, 124 Cal. App. 519, 12 Pac. (2d)
1053.

The obvious exception to this rule is made in such cases where the person sought to be bound consented, either expressly or impliedly, to the acts or declarations of the other party.

It is submitted that in this case appellant has failed to present any evidence that M. D. Weiner was the agent of appellee or had any authority to bind appellee, or that appellee had any knowledge of any communications between appellant and M. D. Weiner, and that therefore none of those communications would be admissible at any trial of this action; and in accordance with authorities previously cited herein, are not properly to be considered on a motion for summary judgment.

Appellant in his opening brief (p. 17) states that one of the issues in this case was "whether Weiner acted in the transaction on behalf of appellant only or was the agent of both parties." But nowhere in his argument does he point out any evidence of the agency on behalf of appellee or the scope of authority of the purported agent, except the fact that Weiner's letter of June 7th, 1944 [Tr. p. 62] purported to answer appellant's letter of June 5th, 1944 [Tr. p. 57] to appellee. But a glance at Mr. Weiner's letter reveals the following facts:

- (a) It is not written on appellee's stationery;
- (b) It has a return address different than that of appellee;
- (c) It is not signed by Mr. Weiner on behalf of appellee;
- (d) The letter itself states the only purpose for which appellant's letter of June 5th was handed to Weiner, to-wit, "to clear with the California Pure Food and Drug Office";

- (e) On the lower left hand corner appears the notation that copies of the letter were mailed to a Mr. Martin B. Lane and Mr. J. T. Laird III, but no indication appears that any copy was ever sent to appellee, or that the letter was ever brought to appellee's attention.

Such a letter does not constitute *prima facie* evidence that Mr. Weiner had authority to bind appellee in any manner whatsoever, and certainly not in the purchase of \$40,000.00 worth of merchandise.

It must be remembered that Mr. Weiner had a personal interest in this transaction. He stood to earn a commission on it. And it was therefore in his own interest to clear the merchandise with the California authorities.

In the appellant's deposition [Tr. p. 44] appellant seems to base his claim that his own agent [Tr. p. 43] was also the agent of appellee upon the ground that appellee's letter of May 20, 1944 [Plff's Ex. E; Tr. p. 58], was dictated by Mr. Weiner, and stated that Mr. Weiner was familiar with the Portuguese Brandy problem. Although the letter was dictated by Mr. Weiner, it was not signed by him, indicating that he did not even have authority to sign a letter of inquiry on behalf of appellee. Furthermore, the letter is addressed to appellant and where it refers to Mr. Weiner, it refers to him as "your representative." It certainly should not be surprising to appellant that their own California representative in the sale of Portuguese Brandy should be familiar with the Portuguese Brandy problem in California, or the Portuguese Brandy problem of his customers. If he had not made himself familiar with those problems he would be a bad salesman. But obviously the fact that he did know the problems connected

with the sale of the merchandise he handled is no evidence that he is the agent of his customers. It is also obvious that the reason he dictated the letter of May 20th, 1944, was because the Portuguese Brandy problem in California was a complicated one, and he was familiar with it, and for no other reason.

In short, the only force of this letter in connection with the relation of Mr. Weiner to appellee can be stated in the words of appellant himself [Tr. p. 44]: "Why it would indicate that he had some confidence in the man."

The only other testimony concerning the agency of M. D. Weiner to appellee is regarding the so called custom and usage in the trade. [Tr. p. 45.] This question is not touched upon in the argument in appellant's brief, and therefore may be sufficiently answered by the following quotation from 25 C. J. S. 106-107:

"Proof of usage is admitted *only when the agency has been first shown*, and then not to enlarge the powers of the agent but only to show the extent of the powers actually conferred." (Italics ours.)

It is also well to point out in support of appellee's contention that there is no proof in the record that Mr. Weiner was appellee's agent that:

- (a) At no time did Mr. Weiner sign any documents on behalf of appellee;
- (b) There is no evidence of any kind that Mr. Weiner ever told appellant that he was an agent of appellee;
- (c) There is no evidence of any kind whatsoever that appellee ever told appellant that Mr. Weiner was appellee's agent;

- (d) The evidence shows that appellant was paying a commission to Mr. Weiner, but no evidence whatsoever that appellee was paying any compensation of any kind to Mr. Weiner.
- (e) The affidavits of Mr. Weiner [Tr. p. 19], of Mr. Lilien, President of appellee [Tr. p. 17], and of Mr. Rose, Vice President of appellee [Tr. p. 15], all deny that any agency relation ever existed between Mr. Weiner and appellee.

Further in connection with this point, there is no evidence of any kind whatever that appellee had any knowledge of any of the communications between the appellant and Mr. Weiner; and Mr. Weiner himself in his affidavit [Tr. p. 20], states that:

“All communications between this affiant and plaintiff were carried on by affiant as plaintiff’s salesman, and without consent or knowledge of defendant.”

In view of the foregoing, it is submitted that there is no showing of any kind that Mr. Weiner ever was the agent of appellee; and that, therefore, in accordance with the authorities above quoted, any communications between Mr. Weiner and appellant would be inadmissible at a trial and are therefore improperly taken into consideration on a motion for a summary judgment.

However, at the risk of being superfluous, and only because this is an appeal from a summary judgment, appellee will present his argument on the question of the legal effect of these communications, if any, in event it might be held that they could possibly be admissible.

- (1) *Weiner's Letter to Appellant of June 7, 1944.* [Tr. p. 62.]

It is submitted that the only effect of this letter is to advise appellant that their letter of June 5th had been handed to Mr. Weiner for checking with the California authorities, and also to advise appellant that Mr. Weiner was about to send them a wire. No mention is made in this letter regarding the price at which the liquor was to be sold, or whether appellee ever authorized Weiner to send the wire.

- (2) *Wciner's Telegram to Appellant of June 7, 1944* [Tr. p. 63]:

Here again there is no mention of any price that the liquor was to be sold for. The telegram does request a confirmation by the appellant to the appellee.

- (3) *The Purported Confirmation of Foregoing Telegram by Appellant* [Tr. pp. 28 and 40]:

This evidence is not cognizable by the Court in connection with a motion for summary judgment, for the reason that it purports to present testimony of the contents of a written document in violation of Rule 56(e) of the Federal Rules of Civil Procedure, which rule states that "sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto, or served therewith." Also refer to the quotation from *Walling v. Fairmont Creamery Co.*, 139 Fed. (2d) 318, *supra*.

The only explanation for failure to offer the telegram, or a copy thereof, appears in Mr. Bernon's deposition [Tr. p. 40], as follows:

"Q. Do you have a copy of that wire? A. No, I haven't got it right now. I also received shipping instructions."

No other explanation for the absence of the written document is given in Mr. Bernon's subsequent affidavit. [Tr. p. 69.]

It might also be noted that Mr. Bernon in his testimony [Tr. p. 40], did not even know whether this telegram was sent to Mr. Weiner in care of appellee or to Mr. Weiner's home. No effort was evidently made to obtain a copy from the telegraph agency which transmitted the wire.

Under the circumstances, it is submitted that the evidence of this communication constitutes no evidence at all; and even if it possibly might have been given some legal effect, it is not properly before the Court and therefore cannot be given any.

(4) *Telegram by Weiner to Appellant on June 9, 1944*
[Tr. p. 65]:

In this telegram Mr. Weiner set forth substantially the terms of the purchase order subsequently executed by appellee, and also mentions a letter of May 18th, which indicates he represented the appellant even before the transaction with appellee started. At the end of this telegram Mr. Weiner states:

"Please confirm by wire or mail and oblige."

It is a significant fact that there is no evidence of any kind, admissible or otherwise, presented by appellant to the effect that he ever answered or confirmed this wire, and it is the only communication that Mr. Weiner ever sent to appellant which sets forth the essential elements of a contract.

It thus appears that not only were these communications between Weiner and appellant not admissible in evidence, and therefore not properly considered by the Court in passing on the motion for a summary judgment, but that they also are of no legal effect in support of any contention that a contract had been executed between the parties to this action.

It should also be noted at the conclusion of this argument, that all evidence of communications between the appellant and Weiner was objected to by Counsel for appellee at the time of the deposition. [Tr. p. 28.]

Conclusion.

Appellee has attempted in this brief to analyze every bit of evidence presented by appellant, in order to show that no contract was ever made between the parties to this action.

Appellee has not attempted to argue the question of damages; for while it is very well established law, requiring no citations, that the question of damages is never settled in a motion for summary judgment, that is especially so in this case, where the appeal is only from the judgment granting appellee's motion for a summary judgment, in which motion and affidavits in support thereof no question is raised regarding the matter of damages.

It is submitted that, giving the appellant the benefit of every doubt to which the evidence properly presented by him might be entitled, the appellee is entitled to a judgment as a matter of law.

In that connection it is well to note that the fact that appellant has himself filed a motion for a summary judgment is an indication by him that he has presented all of the evidence available to him, and that there are no further issues to be raised.

Fox v. Johnson & Winsatt, C. C. A., D. C. 1942.
127 F. (2d) 729.

The action of the District Court of Appeals in granting appellee's motion for a summary judgment thereon should be *Affirmed*.

Respectfully submitted,

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No. 11057

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

IMPORTED LIQUORS COMPANY, a partnership,

Appellant,

vs.

LOS ANGELES LIQUOR COMPANY, INC., a corporation,

Appellee.

APPELLANT'S CLOSING BRIEF.

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APPELLANT'S CLOSING BRIEF.

I.

Comment on Statement of Case.

Appellee's "Statement of Case" (Rep. Br. pp. 1, 2) is a fragmentary argumentative condensation of the facts. Appellant's "Statement of the Case" (App. Op. Br. pp. 3 to 13) may be assumed to be correct, since appellee has not taken exception to any part of it.

II.

Summary Judgment Rules.

We find no fault with the rule which captions this portion of Appellee's Brief, that is, that a summary judgment is proper if nothing but questions of law are involved and the questions must be resolved in favor of the moving party.

This case, however, does not come within this rule for there were, in the language of Rule 56(c), Rules of Civil

Procedure, "genuine issues as to material facts," which appellee's extensive argument serves only to confirm.

We reemphasize the rules that a defendant is not entitled to a summary judgment unless the facts conceded show the right to a judgment with such clarity as to leave no room for controversy; that plaintiff would not be entitled to recover under any circumstances; and that it was not the intention of the rule that a case should be tried by affidavits as a substitute for trial in open court (App. Op. Br. pp. 15, 16) of which appellee has made no criticism.

III.

The Entire Record Must Be Considered.

Nor do we find fault with the rule of law that a mere offer to buy goods may be revoked before acceptance.

This rule of law is correct, but in applying it, appellee has lifted out of the complaint the purchase order of June 12, 1944, and utterly ignored all preceding transactions, including the long distance telephone call, the telegrams and correspondence.

The case cannot thus be restricted to the complaint alone. Rule 56(c), Rules of Civil Procedure, provides for full consideration of the "pleadings, depositions, and admissions on file, together with the affidavits" on a motion for summary judgment.

We need not have set forth in the complaint all of the preliminary negotiations and correspondence—the ultimate facts alone are sufficient. Preliminary negotiations and correspondence and such evidence as may be relevant are admissible at the trial in support of the complaint or to rebut any affirmative allegation of the answer.

Rule 8(a)(2), Rules of Civil Procedure, provides that a pleading shall set forth "a short and plain statement of the claim showing that the pleader is entitled to relief."

Rule 8(e)(1) provides that "each averment of a pleading shall be simple, concise and direct."

Appellee's argument (Rep. Br. p. 6) concerning appellant's use of the word "non-cancellable" is of no force, because at most the word is surplusage and unnecessary to appellant's cause of action; a binding agreement between two persons cannot be "cancelled" except in the manner provided by law.

Appellee's argument (Rep. Br. p. 6) concerning appellant's delay in answering the wire of cancellation likewise is of no force, for first, there was no obligation to reply thereto; second, Mr. Bernon testified that he made some effort thereafter to get ahold of Weiner about it, and he was out of town for a while [Tr. pp. 38, 39]; and third, he had already made arrangements for segregating the brandy and delivering it to appellee [Tr. pp. 33, 34, 36, 39, 42].

Appellee's argument (Rep. Br. p. 6) that there is nothing in the affidavit or deposition of appellant to indicate that Weiner was authorized to bind appellant by acceptance of the order is met by (1) the fact that a mutual binding agreement was reached over the telephone between the parties directly, and the correspondence confirms this; (2) Bernon testified that the custom of confirmation was dispensed with by the direct dealing of the parties over the telephone [Tr. pp. 45, 46, 47]; and (3) the contention assumes that Weiner was exclusively appellant's agent—the facts show that he was the mutual agent of both parties—of appellant for the purpose of sale, and of appellee for the purpose of purchase [Tr. pp. 45, 40].

IV.

The Record Reveals a Binding Contract.

Under heading IV appellee's principal argument resisting this appeal narrows down to the single contention that no binding contract was entered into because (1) no price was agreed upon and (2) the communications between appellant and Weiner are essential to prove a contract and that they are not admissible because he is appellant's agent.

1. PRICE OF THE GOODS SUFFICIENTLY APPEARS.

The Appellee's Reply Brief for the first time raises the contention that price was not agreed upon. Immediately following the filing of the answer appellant requested appellee to answer interrogatories under Rule 33, Rules of Civil Procedure. Appellant asked appellee whether there was any reason for endeavoring to cancel the order other than the reason set forth in the telegram of cancellation, that Irven Rose sold his interest in the Los Angeles Liquor Company. The answer given to this interrogatory under oath was:

"There was still some doubt in our minds whether there would not be some trouble about passing the Brandy with the California authorities, and I decided that it was too much Brandy to order, in view of the fact that Mr. Rose was leaving the Company."
[Tr. pp. 9, 11.]

Nothing about no meeting of minds on price.

In support of its motion for summary judgment appellee filed the affidavits of Rose [Tr. pp. 15, 16], Lilien [Tr. pp. 17, 18], Weiner [Tr. pp. 19, 20] and a supplemental affidavit of Lilien [Tr. pp. 74, 75]. There is

nothing in any of these affidavits to the effect that no price was agreed upon. In his supplemental affidavit, Lilien, in short fashion, refers to the long distance telephone conversation with Bernon—he does not relate the conversation at length.

Appellee filed a "Statement of Grounds and Points and Authorities in Support of Motion for Summary Judgment" [Tr. pp. 13, 14]. Nothing appears therein concerning any lack of agreement about price; the sole ground on which the motion was made was that "an order for goods or chattels is merely an offer to buy, not a contract to sell or purchase" and that an order or offer is revocable before acceptance.

Appellee filed in opposition to appellant's motion for summary judgment "Defendant's Statement in Opposition to Motion for Summary Judgment" [Tr. p. 73]. The sole ground stated in opposition to appellant's motion was that the order "was not accepted by the plaintiff and notice of such acceptance given to defendant prior to defendant's cancellation thereof, and that therefore no agreement of sale existed between the parties." Again, nothing about no meeting of minds on price.

Mr. Bernon, in his deposition, related in somewhat cursory fashion his telephone conversation with Lilien [Tr. p. 27], did not purport to relate in detail everything said. Obviously, price was either taken for granted by him or inadvertently overlooked. Hence, the reason for the rule that summary proceedings should not serve to deprive the parties of opportunity for examination and cross-examination and that judgment should not be granted in summary proceedings unless the plaintiff would not be entitled to recover under any circumstance.

The amount of the deposit required by appellant appears in Weiner's letter to appellant dated June 7, 1944 [Tr. p. 62], and in Weiner's wire to appellant dated June 7, 1944 [Tr. p. 63]. In his wire to appellant dated June 9, 1944 [Tr. p. 65], Weiner gives appellant shipping instructions and clearly states the purchase price at \$41.55 per case. This purchase price again appears in appellee's air mail, special delivery "purchase order" to appellant, dated June 12, 1944 [Tr. p. 54].

On a motion for summary judgment the burden is on the moving party to show affirmatively that he is entitled to judgment with such clarity as to leave no room for controversy and that plaintiff would not be entitled to recover under any circumstances. Has appellee met these requirements? Can it be said that the prime element of any contract—price—was not thoroughly understood or agreed upon between the parties, when it was not made the subject of barter or dickering in the extensive correspondence in the record? Can it be said that a plenary trial with examination and cross-examination of Lilien, Rose, Weiner and Bernon will not result in testimony that price was not at any time discussed or agreed upon?

In any event the wire of Weiner to appellant dated June 9, 1944, and the purchase order of appellee to appellant dated June 12, 1944, both are complete as to price and both confirm the previous telephone conversation and preliminary correspondence and ripen and bind them into a complete contract.

Moreover, it is the settled law that where no price is specified in a contract for the sale of goods, whether executed or executory, the price is supplied by the implication that a reasonable price is intended.

In *Great Western Distillery Products, Inc., v. J. A. Wathen Distillery Company*, 10 Cal. (2d) 442, 74 Pac. (2d) 745, the Supreme Court of California set forth the rule as follows:

“The defendant’s next contention is that the contract was fatally uncertain in that there is no agreement as to the price of the merchandise to be sold by the defendant and purchased by the plaintiff. There is no fatal uncertainty in this respect. The rule is that when no price is specified in a contract for the sale of goods, whether executory or executed, the price is supplied by the implication that a reasonable price is intended. (*Dickerman v. Ohashi Importing Co.*, 63 Cal. App. 101 (218 Pac. 458); *Williston on Sales* (2d ed., 1924), sec. 171.) This rule was adopted in the Uniform Sales Act and has been incorporated into our law by section 1729 (4) of the Civil Code, which provides as follows: ‘Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.’ ”

See, also:

Dickerman v. Ohashi Importing Co., 63 Cal. App. 101 at p. 106, 218 Pac. 458, and the cases and text writers therein mentioned.

Since appellee itself in its purchase order fixed \$41.55 per case as the purchase price it can hardly now deny that that is a reasonable price within the foregoing rule.

2. THE AGENCY OF WEINER.

Appellee contends that Weiner was appellant's agent and therefore all communications between him and appellant are inadmissible; that these communications are essential to the proof of a contract.

We submit first that even if everything concerning Weiner is omitted from the case, a contract is proved. The meeting of the minds of the parties occurred in the telephone conversation on June 5, 1944 [Tr. pp. 27, 47]; nothing remained except to produce a photostatic copy of approval from the Food and Drug Administration [Tr. pp. 27, 47]; this was done at once by the letter of June 5, 1944, from appellant to appellee enclosing the same [Tr. pp. 27, 57, 64]; on June 12, 1944, appellee sent to appellant its purchase order with deposit [Tr. pp. 54, 56]. It was not necessary to complete the contract that this must have been accepted, because the "deal" was made on the 5th of June, 1944 [Tr. pp. 45, 46, 47]. Appellant in the meantime had segregated and made the goods available for delivery to appellee [Tr. pp. 33, 34, 36, 39, 42].

We submit that the evidence was in conflict on the fact as to whether Weiner was appellant's agent or the agent of both parties. Appellee's affidavits, of course, all assert that Weiner was not its agent. In this connection it is obvious that Weiner was by no means an impartial witness; his affidavit was produced by appellee; he sided with appellee; he was not subjected to cross-examination.

Weiner's contention is weakened somewhat by the statement in his affidavit [Tr. p. 19] that he "has been a sales agent of imported wines, brandies and liquors for various companies" for about ten years and that [Tr. p. 20] he "has had other dealings with defendant in the *purchase*

and *sale* of liquors. . . ." (Emphasis ours.) It is true that he followed this up with the self-serving statement that he had never been employed by defendant but the nature of his dealings in the purchase and in the sale of liquors with appellee does not appear.

Bernon testified in answer to a question whether Weiner was the agent of the appellee as follows:

"A. Let me answer that by stating that it has been the practice in the liquor industry for the last few years for agents to represent sellers and at the same time also acting as agents for buyers, due to the fact that the buyers have been unable to get enough merchandise to satisfy their needs; and that is the general practice in the liquor industry.

Q. In this instance he was going to collect commission from you? A. In most instances they collect the commission from the seller, but still act as an agent for the buyer. In fact, some of the agents which we have had were paid commissions when they came to us, even though they were acting as agents for certain purchasers in the country. That is the usual practice since the—since the stopping of distillation by the Federal Government for commercial use." [Tr. p. 45.]

Bernon further testified directly that Weiner was acting as the agent for both parties [Tr. pp. 40, 41, 43, 26].

It is significant to note also that appellant's letter of June 5, 1944, addressed directly to appellee [Tr. p. 57] was not answered by appellee: Weiner answered it by his letter of June 7, 1944 [Tr. p. 62], stating: "This will acknowledge receipt of your letter dated June 5, addressed to the Los Angeles Liquor Company. . . ."

The fundamental rules applicable are as follows:

The existence of an agency and the extent of an agent's authority are questions of fact:

1 *Cal. Jur.* 697, 698;

1 *Cal. Jur.* 865.

Agency may be proved by circumstantial evidence:

McDonnell v. California Lands, Inc., 15 Cal. (2d) 344;

1 *Cal. Jur.* 696;

2 *Am. Jur.* 351.

A court is not bound by a statement of a party as to agency:

New York Indemnity Company v. Western Loan and Building Company, 139 Cal. App. 219.

A salesman on a commission basis is not necessarily an agent; in the cited case he was held to be an independent contractor:

Barton v. Studebaker Corporation of America, 46 Cal. App. 707, 189 Pac. 1025.

It thus appears that the question of Weiner's agency to appellee, even if assumed to be necessary to the introduction of communications between appellant and Weiner, was a highly disputed question and the conflict thereon in itself should have resulted in a denial of the motion.

Conclusion.

The appellee's efforts to worm out of a binding contract, arrived at after considerable negotiations, after appellant set aside the goods and lost the opportunity of selling them favorably elsewhere after the liquor holiday had intervened with its consequent depreciation in price, on the flimsy ground first assigned (in appellee's telegram) that Irven Rose was no longer connected with the company, then on the ground (in the answer) that appellee had not made a contract but merely offered to buy, then on the ground (in the answer to the interrogatory) that there was doubt in appellee's mind whether there would not be trouble in passing the brandy with California authorities, and finally (in its reply brief) that no price was agreed upon, shows a course of conduct at variance with fair dealing and should not receive the stamp of approval of a court of law.

Respectfully submitted,

EZRA K. SHAPIRO,

S. K. WALZER,

BENJAMIN, LIEBERMAN & ELMORE,

Attorneys for Appellant.

No. 11057

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

IMPORTED LIQUORS COMPANY, a partnership,

Appellant,

vs.

LOS ANGELES LIQUOR COMPANY, INC., a corporation,

Appellee.

APPELLANT'S PETITION FOR REHEARING.

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FILED

JUN 28 1946

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No. 11057

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

IMPORTED LIQUORS COMPANY, a partnership,

Appellant,

vs.

LOS ANGELES LIQUOR COMPANY, INC., a corporation,

Appellee.

APPELLANT'S PETITION FOR REHEARING.

Appellant respectfully petitions for a rehearing of this court's affirmance of the judgment of the trial court granting appellee's motion for summary judgment.

The complaint sought recovery of the purchase price of brandy based upon an agreement alleged to have been entered into on June 12, 1944. The crux of this court's opinion is in the statement that no agreement appears to have been made on that day. The court expressly refrained from considering the negotiations and agreements prior to June 12, 1944, stating that it is "immaterial, for this action was not based on any agreement made prior to June 12, 1944, but was based on the order hereinabove described—the order of June 12, 1944. No prior agreement was mentioned or referred to in the complaint."

In this we think the court adopted an outmoded and erroneous construction of the pleading and of the rule relating to the admissibility of evidence. We think the court was required to consider the prior negotiations and

agreements. During the entire period involved, only one final agreement was entered into between the parties—the evidence, contained in the affidavits, deposition, and interrogatories, shows that only one subject of negotiation and agreement existed between them. Whether the agreement was entered into on June 12, 1944, or the day before or after, or the week before or after, it would have been admissible on a trial, and therefore, should have been considered by the trial court on the motion for summary judgment, and certainly by this court, on appeal therefrom.

Undoubtedly, if the complaint had alleged that the agreement was entered into “on or about June 12, 1944”, instead of “on June 12, 1944”, the court would, under the present day enlightened construction of pleadings, have ruled that evidence of a contract, containing the terms pleaded, entered into a week before, would have been admissible in support of the complaint. Since the statute of limitations is not involved, since only one agreement was entered into between the parties during the period involved, since the facts show that the parties obviously did come to terms, if not on June 12, 1944, then a few days before, further confirmed by the writing of June 12, 1944, how is appellee prejudiced or misled by the failure to plead the facts with precision?

Rule 43(a) of the Rules of Civil Procedure states:

“ . . . All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, . . . *the statute or rule which favors the reception of the*

evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. . . .” (*Italics ours.*)

The Federal decisions uniformly hold that the Rules of Civil Procedure provide for the widest admissibility possible under State or Federal law of relevant evidence.

Commercial Banking Corp. v. Martel, 123 F. (2d) 846 (C. C. A. 2);

National Battery Co. v. Lévy, 126 F. (2d) 33 (C. C. A. 8);

New York Life Ins. Co. v. Seighman, 140 F. (2d) 930 (C. C. A. 6);

U. S. v. Vehicular Parking, Ltd., 52 Fed. Supp. 751 (D. C.-Del.).

The California state law on the subject is as follows:
Section 469, Code of Civil Procedure:

“VARIANCE DEEMED IMMATERIAL UNLESS IT MISLED ADVERSE PARTY: ORDER TO AMEND. No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party has been misled, the court may order the pleading to be amended upon such terms as may be just.”

Section 470, Code of Civil Procedure:

“IMMATERIAL VARIANCE, HOW PROVIDED FOR. Where the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs.”

These sections have been liberally construed by the state court:

Consolidated Pipe Co. v. Wolski, 211 Cal. 563, 296 Pac. 277;

Thompson v. M. K. & T. Oil Co., 5 Cal. App. (2d) 117, 42 P. (2d) 374;

Ogden v. United Bank & Trust Co., 206 Cal. 571, 275 Pac. 430.

In *Jaffe v. Stone*, 18 Cal. (2d) 146 at 153, 114 P. (2d) 335, the Supreme Court of California stated that the doctrine that "the allegations of a pleading will be most strongly construed against the pleader . . . (has been) . . . long repudiated in this state."

On the subject directly in point we cite the following from 17 Corpus Juris Secundum 1164:

"Although precision may not in all cases be material, the day on which the contract was made should be alleged.

"The day on which the contract was made must be stated, although the precise day may not be material. The general principle is that in declaring on a parol or simple contract, the day when the contract is alleged to have been made is not material, but where time is a vital element in plaintiff's case, it must be alleged with certainty."

Time, of course, is not an element in the present case—the action was filed well within any statute of limitations.

Some of the California cases construing Section 469, Code of Civil Procedure, are as follows:

In *Wetmore v. City of San Francisco*, 44 Cal. 295, it was held that in an action to recover money an allegation in the complaint of the precise date the money became due

is not a material one and the plaintiff may prove an indebtedness at the time of the institution of the suit.

In *Bancroft Co. v. Haslett*, 106 Cal. 151, 39 Pac. 602, it was held that in an action for conversion where the date of the conversion was alleged to be July, 1892 and the proof showed a conversion on February 21, 1891, the variance was immaterial.

In *Biven v. Bostwick*, 70 Cal. 639, 11 Pac. 790, it was held that in an action to enforce a promise alleged to have been made on a certain day, the plaintiff was entitled to recover on proof that the promise was made at any time before the commencement of the action; he need not have proved that it was made on or about the time alleged in the complaint.

In *Hannel v. Bates*, 12 Cal. App. (2d) 67, 54 P. (2d) 1132, it was held that an allegation of a written three year extension did not preclude proof of a two year extension.

In *Johnson v. DeWaard*, 113 Cal. App. 417, 298 Pac. 92, it was held that where the plaintiff pleaded an oral agreement, evidence of a written agreement did not prejudice, nor mislead, the defendant.

In this connection we call the attention of the Court to the fact that Rule 56(c) of the Rules of Civil Procedure provides that on a motion for summary judgment there should be considered the pleadings, depositions, admissions on file, and affidavits—not merely the complaint alone.

It may be true, as the court in its opinion says, that the complaint contains some legal conclusions but these are

mere surplusage and ample evidence appears in the affidavits, deposition, and interrogatories to require the reversal of a summary judgment. The matter before the trial court and this court was not a demurrer or a motion for judgment on the pleadings, but a motion for a summary judgment—the *facts* as they appeared in the papers before the court and as they might appear on a trial should govern the court's decision and not a mere imperfection in pleading.

The decision of this court, furthermore, leaves the case dangling in the air and tends to a multiplicity of actions. Impliedly the court leaves the door open to a new action by the appellant, since a summary judgment based upon a defect in pleading or upon a contract alleged to have been executed on a precise date, would not be a bar to a new action on a contract alleged to have been executed on another date. Clearly the summary judgment rule was never designed for this accomplishment.

The decision is entirely out of harmony with the controlling authorities and a rehearing should be granted to the end that due reconsideration may be given thereto.

Respectfully submitted,

EZRA K. SHAPIRO,

S. K. WALZER,

BENJAMIN, LIEBERMAN & ELMORE,

Attorneys for Appellant.

Certificate.

The undersigned, one of the attorneys for appellant herein, hereby certifies that in his judgment the foregoing petition is well founded and that it is not interposed for delay.

January 25, 1946.

AARON ELMORE,

Of Counsel for Appellant.

No. 11062

United States
Circuit Court of Appeals

For the Ninth Circuit.

ALFRED LLOYD SAUNDERS,
Appellant,
vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

OCT 3 - 1945

PAUL P. O'BRIEN,
CLERK

No. 11062

United States
Circuit Court of Appeals
For the Ninth Circuit.

ALFRED LLOYD SAUNDERS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States in and
for the Southern District of California Cen-
tral Division

No.: 17677

Viol.: United States Code, Title 50, Appendix,
Section 311 Selective Training and Service
Act of 1940

February, 1945, Term

In the Name and by the Authority of the United
States of America, the Grand Jury for the South-
ern District of California, at Los Angeles, presents
on oath in open court:

That Alfred Lloyd Saunders, hereinafter called
the defendant, is a male person within the class
made subject to the Selective Training and Service
Act of 1940; that defendant registered as required
by said Act and the rules and regulations promul-
gated thereunder, and became a registrant of Local
Board No. 210, said board being then and there
duly created and acting under the Selective Service
System established under said Act in the County
of Los Angeles, State of California, in the division
and district aforesaid; that pursuant to the terms
and provisions of said Act and the rules and regu-
lations promulgated thereunder, defendant was
classified in Class 1-A and was subsequently notified
of said classification by said board, and notice and
order by said board was thereafter duly given to
defendant to report for induction into the Armed
Forces of the United States of America on Jan-

uary 2, 1945, at Los Angeles, California, for en-
trainment to Fort MacArthur, California; that
defendant did thereafter and on or about January
5, 1945, at Fort MacArthur, Los Angeles County,
California, in the division and district aforesaid,
wilfully, and unlawfully fail and neglect to perform
a duty required of him under said Act and the
rules and regulations promulgated thereunder, in
that defendant did then and there knowingly, wil-
fully and unlawfully refuse to be inducted into the
Army of the United States, as so notified and
ordered to do;

Contrary to the form of the statute in such case
made and provided and against the peace and
dignity of the United States of America.

CHARLES H. CARR

United States Attorney

ADMcE:ba [2]

A true bill,

J. W. BOWLES, Jr.

Foreman.

Bail, \$1000.

[Endorsed]: Filed Apr. 18, 1945. [3]

At a stated term, to-wit: The February Term, A. D. 1945, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 30th day of April in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable: Ralph E. Jenney District Judge

[Title of Cause.]

This cause coming on for arraignment and plea of the defendant Alfred Lloyd Saunders; Ray H. Kinnison, Esq., Asst. U. S. Attorney, appearing for the Government; J. J. Marquardt, Court Reporter, being present and reporting the proceedings; the defendant, being present in Court on bond, states his true name to be as charged in the indictment, and it is ordered that this cause be continued to May 7, 1945, at 2 P. M. for plea. [4]

United States District Court Southern District of
California Central Division

Case No. 17677

February 1945 Term

ALFRED LLOYD SAUNDERS

Defendant,

vs.

UNITED STATES

Plaintiff.

The defendant appears in person and hereby files notice of demurrer on the grounds as contained herein. [5]

The Selective Service System consists of three parts—The Selective Service Act, the Amendments to the Act, and the Regulations.

1. The Selective Service Act itself is the body or the ground work of the Selective Service System as originally passed by Congress of the United States.

2. The Amendments are additions to, or changes of the original Act as passed by Congress. These Amendments are legislation deemed necessary by and passed through Congress in addition to the Original act and which are now as much a part of the Act as the Act itself.

3. The Regulations are directives, or orders issued by the President or the Director of the Selective Service System. These directives are subject to change at any time that the President or Director may so desire, merely by re-writing.

These Regulations are to regulate the machinery and personnel under The Selective Service Act so that it can function with order, method and conformity to the Act. These Regulations are not law as are the Selective Service Act and Amendments which were passed through Congress. These Regulations are to promulgate the law of the Act as granted by Congress therein.

Thus the Director of the Selective Service System nor the President, cannot make a Regulation, which will nullify some section of the Selective Service Act and hand it down as law. These Regulations are only regulations under the law and have to conform with the Selective Service Act.

Therefore, since a bill has to be passed by Congress in order to become a law, a Regulation cannot be a law. [6]

Section 5-G of the Selective Service and Training Act of 1940, states—"Nothing contained in this act shall be construed to require any person to be subject to combatant training and service in the land and naval forces of the United States, who by religious training and belief is conscientiously opposed to participation of war in any form."

This is the law of the Selective Service and Training Act of 1940 as approved and passed by Congress. It was passed this way in order not to violate the first Amendment of the Bill of Rights of the Constitution of the United States, which reads as follows:—"Personal Freedom,—Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press;

or the right of the people peaceably to assemble and to petition the government for a redress of grievances.”

In the Jury Trial of Criminal Case No. 16215 on October 11, 1943, — Saunders vs. United States, the defendant was indicted for “failing to report for induction into the armed forces of the United States.” By the prosecutions own witnesses it was definitely proved that the defendant had reported for induction, thus leaving no grounds for a case against the defendant. The District Attorney seeing his plight asked the presiding Judge to “read into the indictment” against the defendant, thus:—“And refusing to be inducted into the armed forces of the United States.” This, the Judge refused to do and instructed the District Attorney that if he wanted the indictment to read that way he would have to have a new indictment made to read as such. This, the district attorney [7] informed the Judge was impossible, because there was no law which required a Conscientious Objector to submit to induction into the armed forces of the United States.

The Judge granted this and told the District Attorney that the purpose of his court was to pass judgment upon the defendant as to the actual reading of a legal indictment.

By the Constitution and by the Selective Service and Training Act itself, there is no law which states that a Conscientious Objector must serve in the armed forces of the United States. In fact, quite the opposite as previously stated, e.g. Section

5-G of the Selective Service and Training Act of 1940 and the first Amendment of the Bill of Rights of the Constitution of the United States.

Also by the rules of Jesus there are no laws which uphold the view that a Christian shall be forced or required to join the armed forces of any land. In fact there are Jesus' rules and laws to the contrary, e.g. the Sixth Commandment which consists of four small, easy to understand words which say, "Thou shall not kill," and in Matthew 26-52—Jesus says, "For all they that take the sword shall perish with the sword." It is a known fact that Christ does not support the strength of the sword and does not support destruction and bloodshed, which is war,—waged by the armed forces. Jesus says, in Matthew 6-24—"No man can serve two masters." A follower of Christ cannot take an oath to serve the armed forces and so do and still serve Christ as a Christian. This I honestly and firmly believe.

One cannot take the oath of the army and wear the uniform of that organization which is dedicated to destruction and bloodshed and in my mind is organized sin against the way of God; and still keep an oath to Christ and wear the uniform of christianity which is dedicated to the construction of peace and brotherly love here on earth. [8]

This gives us a clear cut line between two separate and distinctly different ways of life here on earth; One the way of Christ, to work with his construction crew to build peace and brotherly love

—: or, the other—to “string along” with a man-made organization which is dedicated to destruction and bloodshed, the killing of hundreds, of millions of women, children, and men alike, no discrimination: This is the wrecking gang. Thus I choose to work with the construction crew under Jesus instead of the wrecking gang under the forces of evil and destruction and I cannot reconcile myself to any other course.

War sows the seeds of hate, greed, selfishness and distrust, the grounds upon which unity, trust, brotherly love and peace can never be built. This I solemnly and firmly believe.

My argument and sincere belief is that the United States Constitution, the Selective Service Act, the Ten Commandments, and the laws and rules of Jesus Christ, grant me the privilege of deciding whether I conscientiously object to war in any form. No individuals comprising a draft or appeal board, nor the temporal military head of a temporal state of affairs, have the right nor the power to say that I am not conscientiously objected to war in any form—when I know that I am.

If Congress cannot make no law respecting an establishment of religion or prohibiting the free exercise thereof—then surely an individual cannot so do by writing a Regulation. By such an illegal Regulation the prosecution is trying to convict me and brand me a criminal. This Illegal Regulation was written after the Criminal trial of Case No. 16215, previously mentioned. That trial was lost by the prosecution in an attempt to confiscate the

personal freedom, the constitutional and religious rights of the [9] defendant and to brand the defendant as a criminal. And now,—by a similar method, of unconstitutionality and in his equivocal and audacious way, he is trying to accomplish that which he previously failed to do.

Since, as shown by the above facts, there is no law, but only an illegal Regulation which requires a Conscientious Objector to be inducted into the armed forces of the United States, there is no constitutionally legal grounds for an indictment against the defendant “for refusing to be inducted into the armed forces of the United States.” The defendant hereby moves to have this indictment dismissed by this Court.

Signed 5/2/45

ALFRED LLOYD SAUNDERS

Received copy of within Demurrer this 2nd day of May, 1945

CHARLES H. CARR, HKM
United States Attorney,

[Endorsed]: Filed May 2, 1945. [10]

At a stated term, to-wit: The February Term, A. D. 1945, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 7th day of May in the year

of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Ralph E. Jenney, District Judge.

[Title of Cause.]

This cause coming on for demurrer and plea of defendant Alfred Lloyd Saunders; Wm. P. Haughton, Assistant U. S. Attorney, appearing as counsel for the Government; the said defendant being present in propria persona and on bond; and O. E. Abbott, Court Reporter, being present and reporting the proceedings:

The defendant upon arraignment by the Court states his true name is as set forth in the Indictment, and being informed that he is entitled to a jury trial and to be represented by counsel, and that if he is without funds that the Court will appoint an attorney for him, the defendant states he desires to proceed without counsel, and without a jury. The demurrer is overruled and the defendant pleads not guilty. It is ordered that trial of the cause be, and it hereby is, set for 10 A. M., May 8, 1945, without a jury. [11]

At a stated term, to-wit: The February Term, A. D. 1945, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 8th day of May in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Ralph E. Jenney, District Judge.

[Title of Cause.]

This cause coming on for trial of defendant Alfred Lloyd Saunders; Wm. P. Haughton, Assistant U. S. Attorney, appearing as counsel for the Government; the said defendant being present on bond and in propria persona; and Sam Goldstein, Court Reporter, being present and reporting the proceedings; and both sides answering ready, it is ordered to proceed.

Miss Betty M. Herrell is called, sworn, and testifies on direct examination by Attorney Haughton. Gov't Exhibits 1, 2, 3, and 4 are offered and admitted in evidence.

Stuart Nalls is called, sworn, and testifies on direct examination by Attorney Haughton. Gov't Exhibit 5 is offered and admitted in evidence.

The Government rests. The defendant moves for a directed verdict of not guilty which is denied.

Alfred Lloyd Saunders, defendant, is sworn and testifies in his own behalf. Gov't Exhibit 6 is offered and admitted in evidence.

The Court finds the defendant guilty.

The Court makes a statement and refers the case to the Probation Officer for investigation and report and continues the case until 2 P. M., May 21, 1945, and orders that the defendant remain on his present bond. [12]

At a stated term, to-wit: The February Term, A. D. 1945, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 21st day of May in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Ralph E. Jenney, District Judge.

[Title of Cause.]

This cause coming on for hearing report of the Probation Officer and for sentence of defendant Alfred Lloyd Saunders; Wm. P. Haughton, Assistant U. S. Attorney, appearing as counsel for the Government; the said defendant being present on bond and in propria persona; and H. P. Fursdon, Court Reporter, being present and reporting the proceedings:

The Court pronounces sentence upon the defendant as follows:

* * * * * Judgment (counts 3 and 4 dismissed)

* * * * * [13]

District Court of the United States Southern District of California, Central Division.

No. 17677—Criminal

UNITED STATES

v.

ALFRED LLOYD SAUNDERS

Indictment in one count for violation of U.S.C., Title 50, Secs. 311.

JUDGMENT AND COMMITMENT

On this 21st day of May, 1945, came the United States Attorney, and the defendant Alfred Lloyd Saunders appearing in proper person, and having been advised of his constitutional right to counsel and having been asked whether he desired counsel assigned by the Court, replied that he did not, and,

The defendant having been convicted on verdict of guilty of the offense charged in the Indictment in the above-entitled cause, to wit: on or about January 5, 1945, at Fort MacArthur, California, unlawfully refuse to be inducted into the Army of the United States, as so notified and ordered to do, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby

committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of eighteen months in a Federal Road Camp type of institution, to be chosen by the Attorney General of the United States.

It Is Further Ordered that execution of sentence is stayed for two weeks and that defendant remain on present bond.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) RALPH E. JENNEY

United States District Judge.

The Court recommends commitment to Federal Road Camp at Tucson, Arizona.

Filed this 21st day of May, 1945.

(Signed) EDMUND L. SMITH

Clerk.

By P. D. HOOSER,

Deputy Clerk. [14]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Appellant's Address: Alfred Lloyd Saunders,
3134 W. 112th Street, Inglewood, California.

Offense: Refusing to be inducted into the army
of the United States.

Date of Judgment:—May 21, 1945.

Brief Description of Judgment and Sentence:
Guilty—Eighteen months in road camp type of
Federal prison institution.

I, the above named Appellant, hereby appeal to
the United States Circuit Court of Appeals for the
9th Circuit from the Judgment above mentioned
on the grounds set forth below.

ALFRED LLOYD SAUNDERS.

GROUNDS OF APPEAL

That the indictment was illegal and unconstitutional for reasons stated in the demurrer to the indictment.

That the trial was contrary to the 1st and 5th Amendment of the United States Constitution and Section 5g of the Selective Service and Training Act of 1940.

That the trial was also contrary to the United States Supreme Courts reasoning and judgment in the Falbo and Billings Case.

That the Court claimed it did not have power to review, nor change the draft boards' decision, even though registrant did report.

ALFRED LLOYD SAUNDERS.

Recd. Notice of Appeal May 22/45.

CHAS. H. CARR

per J. M.

[Endorsed]: Filed May 22, 1945. [17]

[Title of District Court and Cause.]

AFFIDAVIT FOR ENLARGEMENT OF TIME

Wm. P. Haughton, being first duly sworn, deposes and says:

That he is the Assistant United States Attorney who tried the above-entitled case for the Government and is in charge of the preparation of the Bill of Exceptions in the appeal of this case.

That the date of Judgment herein was May 21, 1945. That a Reporter's Transcript of the proceedings had and taken at the trial of the above-entitled case has been ordered by the Government; that the Government has been advised that due to the temporary absence from this division of the court reporter said transcript will not be available before June 22, 1945. That by reason thereof it will be necessary for appellee to have additional time within which to file and cause to be settled the Bill of Exceptions in the above-entitled cause and appeal.

Wherefore, affiant prays that this Honorable Court extend the time [18] to and including July 7, 1945 within which to lodge proposed amendments to appellant's proposed Bill of Exceptions herein, and that the District Court have to and including July 14, 1945 to settle and engross the same.

WM. P. HAUGHTON

Affiant

Subscribed and sworn to before me this 16 day
of June, 1945.

[Seal]

EDMUND L. SMITH

Clerk

By CHARLES A. SEITZ

Deputy

[Endorsed]: Filed June 18, 1945. [19]

[Title of District Court and Cause.]

ORDER ENLARGING TIME

Upon reading the affidavit of Wm. P. Haughton,
and good cause appearing therefor,

It Is Hereby Ordered that the time within which
appellee may lodge amendments to the proposed
Bill of Exceptions and Assignments of Error be
enlarged to and including July 7, 1945, and that
the Court may have to and including July 14, 1945
within which to settle the same.

Dated: June 16, 1945.

RALPH E. JENNEY

United States District Judge

[Endorsed]: Filed June 18, 1945. [20]

[Title of District Court and Cause.]

STIPULATION RE EXHIBITS

It Is Stipulated that the Exhibits in the above entitled case may be forwarded by the Clerk of the District Court to the Clerk of the Circuit Court, and that said exhibits may be deemed part of the record on appeal and need not be printed as part of the record on appeal.

Dated this 10th day of July, 1945.

ALFRED SAUNDERS

Defendant-Appellant

CHARLES H. CARR

United States Attorney

JAMES M. CARTER

Assistant U. S. Attorney

WM. P. HAUGHTON

Assistant U. S. Attorney

By WM. P. HAUGHTON

Attorneys for Plaintiff-

Appellee

It is so ordered July 12, 1945.

RALPH E. JENNEY

Judge

[Endorsed]: Filed July 12, 1945. [21]

[Title of District Court and Cause.]

PRAECIPE

To the Clerk of the District Court of the United States, in and for the Southern District of California, Central Division.

You will please prepare the following record in the above-entitled cause for the Ninth Circuit Court of Appeals;

Clerk's Transcript as follows:

1. Indictment;
2. Demurrer to Indictment;
3. Minutes of May 7, 1945 on overruling of demurrer and showing defendant entered plea of not guilty to the charge contained in the indictment;
4. Minutes of May 8, 1945 on oral motion for a verdict and on denial of said motion;
5. Verdict of the Court;
6. Judgment and sentence;
7. Notice of Appeal; [22]
8. Bill of Exceptions and Assignments of Error;
9. This Praecipe.

Dated this 11th day of July, 1945.

CHARLES H. CARR

United States Attorney

JAMES M. CARTER

Assistant U. S. Attorney

WM. P. HAUGHTON

Assistant U. S. Attorney

By WM. P. HAUGHTON

Attorneys for Plaintiff-

Appellee

[Endorsed]: Filed July 12, 1945. [23]

In the District Court of the United States Southern
District of California Central Division

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 23 inclusive contain full, true and correct copies of Indictment; Minute Order Entered April 30, 1945; Demurrer; Minute Orders Entered May 7, 1945, May 8, 1945 and May 21, 1945 respectively; Judgment and Commitment; Notice of Appeal; Affidavit for Enlargement of Time; Order Enlarging Time; Stipulation and Order re Exhibits; and Praeceptum which, together with Original Bill of Exceptions, Assignment of Errors and Exhibits, transmitted herewith, constitute the

record on a appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$7.25 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 21 day of July, 1945.

[Seal]

EDMUND L. SMITH,

Clerk

By THEODORE HOCKE

Chief Deputy Clerk

[Title of District Court and Cause.]

GOVERNMENT'S PROPOSED BILL OF
EXCEPTIONS.

Be It Remembered that the above entitled cause came on for hearing on Demurrer to the indictment and for plea of defendant, on May 7, 1945 before the Honorable Ralph E. Jenney, presiding in Courtroom No. 3 of the District Court of the United States for the Southern District of California, Central Division, sitting without a jury.

The United States of America, Plaintiff, appearing by Charles H. Carr, United States Attorney, and William P. Haughton, Assistant United States Attorney, and the defendant appearing In Propria Persona.

The following proceedings were had:

“The Clerk: No. 17677 Criminal, United States vs. Alfred Lloyd Saunders.

The Court: Mr. Saunders, you do not desire counsel? You understand your legal rights—if you haven’t money you are entitled to have counsel appointed and you are also entitled to the right of trial by a jury, if you wish, you understand that?

The Defendant: Yes.

The Court: I think I can explain this thing to you so that you will understand it. The indictment charges that, pursuant to the terms and provisions of the Selective Training and Service Act of 1940 and the rules and regulations promulgated thereunder, you were classified 1-A and were notified of said classification by local board 210; that thereafter you were ordered to report for induction into the Armed Forces of the United States on January 2nd, 1945, at Los Angeles, and that you knowingly, wilfully and unlawfully refused to be inducted into the Army of the United States after having been notified and ordered so to do. You understand that is the charge in this indictment?

The Defendant: Yes.

The Court: In your demurrer you refer to the jury trial of October 11, 1943, in 16215, wherein you were indicted for failing to report for induction into the Armed Forces of the United States. This file contains only the indictment and a copy of Judge Harrison’s minute order of November 27, 1943, wherein he ordered, on the motion of the Assistant United States Attorney, that the indictment in that case and six others be dismissed pur-

suant to authority received from the Attorney General. Apparently you are referring to Case No. 16275 against you, wherein a jury trial was had on October 19, 1943, is that correct?

The Defendant: Yes.

The Court: You state in your demurrer that by the prosecution's own witnesses in Case 16215 it was definitely established that the defendant had reported for induction, thus leaving no grounds to support the case against you; that the District Attorney asked the Presiding Judge to read into the indictment "And refusing to be inducted into the Armed Forces of the United States", which the Judge [2] refused to do, stating there would have to be a new indictment. You do not designate the section number of the regulation you refer to as illegal, but you say it was written after the trial in Case 16215. Apparently you are referring to 663.21 (b) (5), as this section was amended, effective January 10, 1944, to read, "Upon reporting for induction it shall be the duty of the registrant * * * to submit to induction".

The Defendant: Yes.

The Court: I think you misunderstand why the trial was lost by the prosecution in Case 16215. It was only because of the failure of proof under the charge of the indictment in that particular case. I cannot help but disagree with your contention that the regulation violates the Act and the Constitution, nor do I agree with your contention that the regulation is not the law. Under the circum-

stances I must overrule your demurrer, and I have given it my very careful consideration. You are entirely familiar with the indictment, as you have read it and studied it in order to prepare your demurrer?

The Defendant: Yes. I do not know whether this is unusual in court procedure, but I would like to ask the Court if my trial might be set aside for appeal, pending my appeal, and I remain out on bail.

The Court: Why don't you do this—saving your rights—why don't you go on to trial and take the whole thing up at one time? If you go up on this demurrer you would have to stand trial, anyway. It seems the questions of fact are not very complicated. Why don't you just simply have those things decided as questions of fact and then take them all up with the Circuit Court, and then you will have a clean-cut case?

The Defendant: Well, I would like if the Court will permit me here, I would like to read a couple of phrases out of the Falbo case and the Billings case, which is merely dicta, but nevertheless, which signifies one should have the right to have this reviewed by the courts. [3]

The Court: I haven't any objection to your doing it. Would you like to have some counsel? I think you said you did not care to have counsel appointed for you.

The Defendant: No, I feel very deeply I am right in my convictions. Of course, I may not be, but I feel as long as I am able to speak for myself

that I can speak more freely than I could have someone do for me.

The Court: You understand that you may be 100 per cent right in your convictions, that you may be doing exactly what your convictions dictate, but you still may be wrong technically under the law, you understand that?

The Defendant: Yes.

The Court: I am familiar with these cases, but you call my attention to them if you wish to.

The Defendant: In Part 1 in the Falbo case—it is dicta, of course—but I would like to read from the Supreme Court decision in that case.

The Court: Anything the Supreme Court says is interesting.

The Defendant: "The mobilization system which Congress established by the Act is designed to operate as one continuous process for the selection of men for national service."

And on down further it says:

"If he has been clasified for military service his local Board orders him to report for induction into the Armed Forces. If he has been classified a conscientious objector, opposed to non-combatant military service, as was petitioner, he ultimately is ordered by the local board to report for work of national importance. In each case the registrant is under the same obligation to obey the order. But in neither case is the order to report the equivalent of acceptance for service."

The footnote states: [4]

“No man shall be inducted for training and service under this Act unless and until he is acceptable to the land or naval forces for such training and service and his physical and mental fitness for such training and service has been satisfactorily determined. We are informed by the government that pursuant to this section approximately 40 per cent of the selectees who report under orders of local boards for induction into the Armed Forces are rejected, and that, as of October 15, 1943, 610 of the 8,000 selectees who had reported for civilian work of national importance had been rejected.

“Even if there were, as the petitioner argues, the constitutional requirement that judicial review must be available to test the validity of the decision of the local board, it is certain that Congress was not required to provide for judicial intervention before final acceptance of an individual for national service.”

In the Billings case handed down two months later, there is a statement along the same lines of reasoning:

“It should be remembered that he who reports at the induction station is following the procedure outlined in the Falbo case for the exhaustion of his administrative remedies. Unless he follows that procedure he may not challenge the legality of his classification in the courts.”

To me that seems that the order to report, being different than an acceptance, that one would have to follow through the classification system set up by Congress in order to acquire the validity test in

the courts of the United States, under the Constitution—the Fifth Amendment to the Constituion. In other words, it seems to me the reasoning of the Supreme Court there is very definite, that one who follows that continuous process of Selective Service up to the last stage, as they decided in the Falbo case—which is to report—is entitled to a review of his case in the courts of the United States. [5]

The Court: Mr. Tietz, will you come forward? Mr. Horowitz, will you please come forward? Would you two distinguished members of the bar act as friends of the Court in this matter? It is my suggestion that this boy go to trial, it being my understanding that if the indictment is improper that he will not lose any of his rights; I having overruled his demurrer, he can go to trial and then take it up and determine the entire matter. Do you think that is a sound view?

Mr. Horowitz: No question about it. I think he should merely take an exception on the overruling of the demurrer, and I do not think he has any right to appeal on the demurrer alone.

The Court: What is your reasoning, Mr. Tietz?

Mr. Tietz: I would like to disqualify myself. Mr. Saunders has been in our office.

The Court: I am asking you as a friend of the Court if you think that procedure is sound, in order to protect the fundamental rights of this man.

Mr. Tietz: I see no rights he would waive by that course of action.

The Court: I think the thing for you to do—maybe I am wrong—but I think the thing for you

to do is to go to trial tomorrow morning and let this matter be in shape so that you can have it reviewed. I will give you an exception to my ruling, and let's put the trial on for 10:00 o'clock tomorrow morning and have the record complete. Then you can go up with something you may be able to protect yourself on. The facts are so simple that no additional time is needed for preparation.

The Defendant: The only thing is if I do have a trial I would like to see if I could remain out on bail.

The Court: I can take care of that. I am not tough about that. I wanted these distinguished lawyers to assure me that your interest was protected and I was not in any way involving you. We will go to trial tomorrow morning at 10:00 o'clock, before me.

I did not mean to ignore you, Mr. Haughton, and I did not want to embarrass you. [6]

Mr. Haughton: Has a plea been entered?

The Court: You are familiar with the indictment?

The Defendant: Yes.

The Court: Do you waive the reading of the indictment?

The Defendant: Yes.

The Court: You understand if you have no money to pay for it, that you are entitled to have counsel appointed and have a trial by jury?

The Defendant: Yes.

The Court: Or you can waive a trial by jury and have a trial by the Court?

The Defendant: Yes.

The Court: Are you ready to plead?

The Defendant: Yes.

The Court: What is your plea?

The Defendant: Not guilty.

The Court: Do you wish a trial by jury or without a jury?

The Defendant: No, I think you are fair.

The Court: Is that satisfactory to the government, to waive the jury?

Mr. Haughton: That is satisfactory to the government.

The Court: We will go to trial tomorrow morning at 10:00 o'clock, before me.''

The above entitled cause came on for trial on May 8, 1945 before Honorable Ralph E. Jenney, presiding in Courtroom No. 3 of the District Court of the United States for the Southern District of California, Central Division, sitting without a jury.

The United States of America, Plaintiff, appearing by Charles H. Carr, United States Attorney, and William P. Haughton, Assistant United States Attorney, and the defendant appearing In Propria Persona.

The following proceedings were had and the following evidence, both oral and documentary, was received, to wit: [7]

MISS BETTY M. HERRELL

called as a witness on behalf of the Government, having been first duly sworn, examined and testified as follows:

My name is Miss Betty M. Herrell. My occupation is Chief Clerk of Local Board No. 210, which is in the City of Los Angeles and County of Los Angeles. I have been Chief Clerk of the Board since July of 1944 and have been in Selective Service since 1941. Local Board No. 210 is set up under the Selective Service System. There are three members on the board. They receive no compensation. I am acquainted with defendant Alfred Lloyd Saunders. He is a registrant of Local Board No. 210. As Chief Clerk of Local Board No. 210 I have custody and charge of all the records and files of the registrants of that Board. This is the original registration card of defendant Alfred Lloyd Saunders. At the time of registration he gave as his address, 4252 Creed Avenue, Los Angeles. That address is within the jurisdiction of Local Board No. 210.

The Government introduced into evidence the registration card of the defendant, which was marked and received in evidence as Government's Exhibit No. 1. (Said exhibit was certified to the Circuit Court of Appeals pursuant to stipulation of the parties.)

This is the Selective Service questionnaire of this defendant in his file with my Board. It was made out, signed and filed by this defendant. He

(Testimony of Miss Betty M. Herrell.)
was classified in 1-A on May 22, 1944. Notice of such classification was mailed by me to defendant on May 23, 1944. He appealed the 1-A classification. The Appeal Board confirmed the 1-A classification. Notice of that action was mailed to defendant on December 5, 1944.

The questionnaire referred to was marked as Government's Exhibit No. 2 and was received in evidence. (Said exhibit was certified to the Circuit Court of Appeals pursuant to stipulation of the parties.)

This paper entitled him to Individual Appeal Record. It is the appeal record of the defendant. It shows the action by the Appeal Board and is a part of the records and files of this registrant with my Board.

The document referred to is marked as Government's Exhibit No. 3 and was received in evidence. (Said exhibit was certified to the Circuit Court of [8] Appeals pursuant to stipulation of the parties.)

Thereafter the defendant was ordered to report for induction by Local Board No. 210. On December 19, 1944 he was mailed an Order to Report for Induction on January 2, 1945. This is a copy of the original which was mailed to defendant.

The document referred to was marked as Government's Exhibit No. 4 and was received in evidence. (Said exhibit was certified to the Circuit Court of Appeals pursuant to stipulation of the parties.)

(Testimony of Miss Betty M. Herrell.)

Thereafter I received information from Fort MacArthur that this defendant had reported down there but refused to be inducted.

STUART C. NALLS,

called as a witness by and on behalf of the Government, having first been duly sworn, examined, and testified as follows:

I am a Special Agent for the Federal Bureau of Investigation and was such on March 27, 1945. On that date I had an interview with the defendant in this case, Alfred Lloyd Saunders. He stated to me that he had reported to Fort MacArthur on or about January 2, 1945; had been asked to return on a later date, January 5, 1945, at which time he did return. He stated that at that time he left the Induction Station before completing the induction, and after informing a Sergeant at the Induction Center that he was not going to take the oath of induction into the armed services of the United States, inasmuch as he was a Conscientious Objector. At the time of the interview I took a written statement from the defendant to that effect. No promises or threats were made in connection with the statement. This document, consisting of two pages, dated March 27, 1945, is the statement referred to. The signature appearing at the end is the signature of Alfred Saunders. It was signed in my presence.

(Testimony of Stuart C. Nalls.)

The document referred to was marked as Government's Exhibit No. 5 and was received in evidence. (Said exhibit was certified to the Circuit Court of Appeals pursuant to stipulation of the parties.)

"Mr. Haughton: The government rests.

The Court: I think in order to protect yourself on your demurrer, [9] you had better move for a verdict in your favor on the evidence, before you proceed, in order to protect your position on the ground that the indictment doesn't state a crime, and for the other reasons indicated in your demurrer. Do you so move?

The Defendant: I do, your Honor.

The Court: That will be denied and exception allowed. Now you may safely go ahead. Do you wish to take the stand yourself?

The Defendant: Yes. [9a]

ALFRED LLOYD SAUNDERS

called as a witness in his own behalf, having been first duly sworn, examined, and testified as follows:

In reporting ot the Induction Station I feel that it is my duty to obey the law up to the point where it interferes with a man's conscience and I feel that under the Constitution of the United States I have a right and a privilege to refuse to enter any form of killing of my brother mankind; and I feel that

(Testimony of Alfred Lloyd Saunders.)

under the circumstances I am taking my right as granted me by the Constitution, the Selective Service Act, and the laws of God. I do not believe that killing and bloodshed and war will accomplish the settlement of man's arguments between man and between nations. I think that will just about state my feelings, combined with the reasons that I have given you in my demurrer, and my reasoning based upon the decisions of the Supreme Court in the Falbo and the Billings cases, which I believe, although I may be wrong, support my thinking. I attended the University of California and while there took R. O. T. C. For some time I worked for the Douglas Aircraft plant in the making of airplanes to be used in this war. When taking R. O. T. C. in college, it was a very good experience and one of the factors in making my belief as it is today; and also, my experience in the aircraft factory, as to the feeling of my fellowmen with whom I worked, toward the war, and the effects of the war, and so on. I quit there of my own volition.

“The Court: Do you have any further testimony you wish to introduce? Do you have anything further you wish to bring before the Court?

The Defendant: Just a couple of things, your Honor.

In my time, the classifications I have received from the board, I have again and again asked the board members—and had appointments with them—asked for my classification as a conscientious

(Testimony of Alfred Lloyd Saunders.)

objector, which have been refused, and which if I had been granted I would not have turned down. It isn't the fact that I don't believe in supporting the law as passed by Congress and the United States. I believe that they have seen fit to recognize the conscience of the individual above that of the temporal state, and have so passed the Act under the Constitution. [10]

Of course, they have done their best in classifying me as they saw fit. I don't doubt their belief and sincerity in so classifying me; but at the same time, I do not believe that one man can come up to another man and tell him whether he is opposed to war or whether he believes in war, in killing, and in bloodshed. It is more or less up to the individual.

The Court: As I understand your position, your position is that you are a conscientious objector; that the board declined to so classify you, and classified you a 1-A; that had they so classified you, you would have been perfectly willing to have gone to a conscientious objector's camp as provided by law?

The Defendant: That's right. And at the same time, I appeared in court once before and was forcibly taken over by the M. P.'s and spent seven months in the Army guardhouse and stockade, when at any time if I would have accepted the Army principles I would have been released from the guardhouse or the Army stockade.

The Court: When was that?

(Testimony of Alfred Lloyd Saunders.)

The Defendant: That was in '42 and '43. I spent two months in Fort MacArthur and five months at Camp Haan in Riverside. And at that time my contention was that I was still under civilian authorities and not the Army authorities; and upon my appeal to the Circuit Court at San Francisco, it was upheld with the return of the Billings case, and I was freed on a writ of habeas corpus.

The Court: Then you were again brought up for reclassification before the draft board?

The Defendant: Yes, sir. I did not believe I was in the wrong. I could have at any time admitted that I was wrong and have accepted the Army principles in the Medical Corps or otherwise; but I do not feel that a Christian can wear the uniform of Christianity and still serve the United States in the temporal state and wear that uniform, because Christianity or the laws of Christ do not support killing and destruction. [11]

The Court: Since you were incarcerated by the Army in the guardhouse, did you file a conscientious objector's form before the draft board?

The Defendant: I did that when I registered.

The Court: You did that when you registered?

The Defendant: Yes, sir.

The Court: And did you again appear before the draft board in support of your contention that you were a conscientious objector?

The Defendant: I did, sir.

The Court: You had a hearing before the draft board?

(Testimony of Alfred Lloyd Saunders.)

The Defendant: Yes. And I explained to them there that I could not accept the Army; that if I felt I was right in so doing I could have done so then and wouldn't have had to stay for seven months in the Army guardhouse. I also explained to them while not becoming a part of the organized forces that at the same time I could accept a C. O. classification because that does not involve the killing of men and women and children by the thousands, and that by accepting the Army I absolutely felt that I was a part of it.

The Court: Well, the difficulty with the situation is this: This court has no power to review classifications of the draft board. I might feel very firmly that you were a conscientious objector and should have been so classified and should have gone to a conscientious objector's camp as the law provides in the exercise of the congressional discretion, but if the draft board and the organization set up under the directive from the Congress by the Executive Branch of the government feels otherwise there is nothing I can do insofar as your being guilty or innocent of this particular crime, so long as I do not feel that technically your position is sound from the legal standpoint on your demurrer and your motion for a directed verdict.

If you are both through with your case——

Mr. Haughton: If the Court please, I would like to ask two or three more questions, inasmuch as the subject of classification has been [12] entered into.

(Testimony of Alfred Lloyd Saunders.)

I would like, also, to introduce the entire file of the draft board, which has the full record.

The Court: There is no objection to the file of the draft board going in?

The Defendant: Not at all.

The Court: It may be received, and you may ask Mr. Saunders what you wish to ask him."

The entire file of the draft board was then introduced and received in evidence and marked as Government's Exhibit No. 6. (Said exhibit was certified to the Circuit Court of Appeals pursuant to stipulation of the parties).

ALFRED LLOYD SAUNDERS,

called as a witness in his own behalf, having been previously duly sworn, resumed the stand and testified further as follows:

Cross Examination—(Continued)

"By Mr. Haughton:

Q. You used the word "Christianity" once or twice in your statement. You do not belong to any church, do you? A. I do not.

Q. You never belonged to any church, did you?

A. With the exception of my affiliation with the Friends of Reconciliation.

Q. You are a member of an organization known as the Fellowship of Reconciliation? A. Yes.

Q. That organization—

(Testimony of Alfred Lloyd Saunders.)

The Court: You must do it audibly so he will get it. The answer was Yes?

The Witness: Yes.

Q. By Mr. Haughton: That organization is a pacifist organization, is it not?

A. It is an organization that is against war among mankind of any kind and for the reconciliation of the differences of mankind through [13] non-violent actions.

Q. The last time you were in court and the time you mentioned when you were held under military authorities, you had a hearing before the hearing officer of the Department of Justice, did you not? A. That's right.

Mr. Haughton: That is all, if the Court please.

The Court: The file has been stipulated into the record, and it may be marked in evidence.

The Clerk: Government's No. 6.

The Defendant: Were the—well, that is all right.

The Court: Go ahead. Don't be afraid. You can say whatever you have in your mind. You are entitled to your day in court. I want you to say what you want to say.

The Defendant: As to the hearing officer's report and the F. B. I. reports, I feel that they are unjustified and have no basis of proof in the court as to bearing upon my questions.

The Court: That statement is predicated upon this thought, as I understand it: You believe that a man may be a conscientious objector within the

(Testimony of Alfred Lloyd Saunders.)

meaning of the Congress when it passed the Selective Service Act and provided for such classification, regardless of the fact that he is not a Jehovah Witness, or a Presbyterian, or a Catholic, or a Quaker, or belongs to any other organized church; that he may be just as good a conscientious objector without belonging to any organized group? So far that is your position?

The Defendant: Yes, sir.

The Court: And that you showed your conscientious objector's viewpoint when you were originally classified, by filing a conscientious objector's form; that you substantiated that position when you refused to accept the discipline of the Army and spent some seven months in the guard-house, when all you had to do was to accept a non-combatant status in the military forces and work in the hospital? [14]

The Defendant: Yes.

The Court: That you feel the reports of the F. B. I. and the hearing officer were not predicated upon sound reasoning or upon a proper grasp of the evidence which you brought up?

The Defendant: Yes, sir.

The Court: Further than that, you state that you are willing to accept a classification of conscientious objector and are willing to subject yourself to the discipline of the camp as provided for by the law, is that correct?

The Defendant: That's right.

(Testimony of Alfred Lloyd Saunders.)

The Court: I think you were in court yesterday when I discussed several of these cases, and when I indicated what my belief was on the law. I will, briefly, repeat it.

I believe the Congress in time of war has the power to do what it proposed to do by the Selective Service Act. I believe that it had the right to delegate the setting up of the organization to accomplish the purpose to defend the country in war to the Executive Branch of the government; that the President had the right to set up the organization that he did set up; and that the right to determine the classifications is in the draft board; that I, as a Judge of the United States District Court, have no right, no power, under the law, to review that action of the draft board, provided it shows on its face that the regular administrative processes were carried out.

In this proceeding I haven't any choice. On the evidence you are guilty of the offense charged. I then have to consider what your punishment is going to be under the circumstances.

I want to send this matter to the Probation Officer for a complete report and recommendation.

Are you out on your own recognizance or out on bond?

The Defendant: I am on bond now.

The Court: Well, the bond will just be continued and I will ask you to report to the Probation Office and give them a complete record, [15] so that

(Testimony of Alfred Lloyd Saunders.)

it will be in the file, and the matter will be continued until 2:00 o'clock on the afternoon of a week from next Monday, and then I will determine what sentence to mete out under the circumstances.

The Defendant: Yes, sir.

The Court: I think I understand your position. I think you understand mine, too.

The Defendant: Yes, sir, your Honor, but at the same time I feel, also, that you are not only the judge but the jury of the court as well, and that it is your privilege to act so, and I wanted to, in my explanation in regard to the F. B. I. investigations—from what I understand, in court such accusations or references that they make are ordinarily supported by proof. That is what I meant.

The Court: I think maybe I didn't make that clear. I don't think that, so far as this case is concerned, it made any difference if the F. B. I. Agent hadn't gone on the stand at all. I could ignore that testimony entirely and just take the record and your statement, and as a matter of law I have no choice, you still, technically, are guilty under the law.

So, if there is anything prejudicial in that F. B. I. testimony, you don't need to worry about that at all, because it is not necessary to a determination of this case. However, all of those matters are matters which will be of interest to me when I come to impose sentence, and you should make your statement to the probation officer so it will come to me,

(Testimony of Alfred Lloyd Saunders.)

and I will have a full picture before me. Is that clear?

The Defendant: Yes, sir. Pardon me. The only thing was—another thing I wanted to mention was I expect to try to appeal my case upon the grounds that I believe——

The Court: Indicated in the demurrer?

The Defendant: Yes, sir.

The Court: I think we may consider that you have made your motion for a verdict for the same reasons that you indicated in the demurrer prior to any finding of guilty. May it be so stipulated?

Mr. Haughton: So stipulated, your Honor.

The Court: So your record is protected, and you can take the matter up on that ground.

You are entitled to appeal and the Circuit is entitled to hear the matter and determine it once and for all.

Did you prepare your papers on the appeal yourself in the habeas corpus matter?

The Defendant: No, sir.

The Court: It was Wirin and Tietz that took that case up?

The Defendant: Yes.

The Court: And the Circuit Court of Appeals reversed the District Court, did it not?

The Defendant: Yes, sir.

The Court: Who heard the case in the District Court?

The Defendant: Judge Yankwich.

(Testimony of Alfred Lloyd Saunders.)

The Court: I knew the case and knew the name but I hadn't put you and that case together. I didn't realize you were the Saunders in that case.

You have got a clean-cut issue now.

The Defendant: There is only one thing, I was interested in carrying the case up myself.

The Court: I think you have a perfect right to take your case up yourself. I don't know of anything in the way of regulations that would prevent that. Do you, Mr. Haughton?

Mr. Haughton: No, your Honor.

The Court: You go ahead. Mr. Smith in the Clerk's office will give you all the help you need. It is a very simple affair.

The Defendant: That is, just to verify my statement yesterday for having the trial set aside—

The Court: I think you and Mr. Haughton can save yourselves a lot of work on the appeal, because I think Mr. Haughton and you can sit down and stipulate to the questions that are to go up to the Circuit. [17] It is a clean-cut proposition; there is no conflict in the evidence. There it is, and I think you can save yourself and the Clerk's office a tremendous amount of work, don't you, Mr. Haughton?

Mr. Haughton: I think so, your Honor.

The Court: It is all right. It is a good thing to have the Circuit pass on it. There isn't anything difficult about it.

Have you got a copy of the rules of the Circuit Court of the Ninth Circuit on Appeal?

(Testimony of Alfred Lloyd Saunders.)

The Defendant: No, I don't.

The Court: Mr. Smith in the Clerk's office will give you a copy. If he hasn't one, you can borrow mine.

We will stand adjourned.

(Whereupon, on May 8, 1945, at 10:50 o'clock
an adjournment was taken until May 21, 1945,
at 2:00 o'clock p. m.)

Los Angeles, California, Monday, May 21, 1945.
2:00 P. M.

The Clerk: 17677, United States vs. Alfred
Lloyd Saunders.

The Court: Mr. Saunders, I think I understand
your case pretty well by now. Is there anything
further you would like to add to what you have
already told us?

The Defendant: No.

The Court: I will just say the same thing to
you that I said to the previous defendant. I don't
think there is anything I can do. The sentence
of the court is that you serve a term of 18 months
in a Federal Road Camp type of institution to be
designated by the Attorney General or his author-
ized representative. The court recommended that
you be committed to the Federal Prison Camp at
Tucson, Airzona.

Do you want a little time before you start
serving?

The Defendant: Yes. I would like to ask, if I may, to have the sentence satisfied or to be allowed to be out on bail or otherwise so that I may appeal my case higher. It seems to me, your Honor, that [18] since this country was established by the people who were denied their religious beliefs in other parts of the world——

The Court: I am willing to give you any reasonable length of time to protect your appeal. Two weeks ought to be enough to do that. I can't leave you out indefinitely while you perfect your appeal.

The Defendant: I would be willing to be let out on bail.

The Court: You can get that from the Circuit Court when you perfect your appeal. Have you served your notice of appeal or anything like that?

The Defendant: No. I was informed they could not be served until judgment.

The Court: Yes, that is true.

The Defendant: I would be willing to work in any hospital or otherwise where you might see fit pending the appeal to the Circuit Court.

The Court: Suppose I stay the execution of sentence for a period of two weeks, and in the meantime you perfect your appeal and then you make an application to the Circuit Court of Appeals for release pending appeal. It will be under their jurisdiction.

The Defendant: That would not be within your power to grant, other than that, that is, with me working in a hospital or some other place which the court might see fit?

The Court: I don't think I would have the power to do that. I think that I could admit you to bail on appeal, but when you are admitted to bail then that would be up to you as to what you did. What you are going to do might have considerable effect upon whether I put you on bail or not.

The Defendant: I want to appeal the case to the Circuit Court, and, if you desire, at the same time to be working at any hospital which the court might see fit, which I believe would be of more good to the country than being incarcerated. [19]

The Court: Well, I will stay the execution of that sentence for a period of two weeks. You go ahead and perfect your appeal and then I will see what I can do.

The Defendant: Thank you.

The Clerk: He remains on the present bond?

The Court: Yes."

The foregoing Bill of Exceptions was prepared within the time allowed by law as extended, and correctly sets forth the proceedings and evidence in connection with said trial, and therefore settled, allowed and approved.

Dated: This 12th day of July, 1945.

RALPH E. JENNEY

Judge of the United States
District Court.

[Endorsed]: Filed July 13, 1945.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated that the foregoing Bill of Exceptions is correct and may be allowed. That a copy of the same was received.

Dated: July 10th, 1945.

ALFRED SAUNDERS

Defendant-Appellant

CHARLES H. CARR

United States Attorney

JAMES M. CARTER

Assistant U. S. Attorney

WM. P. HAUGHTON

Assistant U. S. Attorney

By WM. P. HAUGHTON

Attorneys for Plaintiff-

Appellee

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

1. That the indictment was illegal and unconstitutional and the demurrer should have been sustained.

2. That the trial was contrary to the First and Fifth Amendments of the United States' Constitution and Section 5g of the Selective Service and Training Act of 1940, which was intentionally worded so as not to violate the First Amendment of the Constitution of the United States.

3. That the trial was also contrary to the United States Supreme Court's reasoning and judgment in the Falbo and Billings Case.

4. That a Court does have the right to review draft board decisions and right the wrongs committed by these draft board decisions.

ALFRED LLOYD SAUNDERS.

[Endorsed]: Filed June 11, 1945.

[Endorsed]: No. 11062. United States Circuit Court of Appeals for the Ninth Circuit. Alfred Lloyd Saunders, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed July 23, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 11062.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ALFRED LLOYD SAUNDERS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

CHARLES H. CARR,

United States Attorney;

JAMES M. CARTER,

*Assistant United States
Attorney;*

WILLIAM STRONG,

*Special Assistant to the
United States Attorney;*

WM. P. HAUGHTON,

*Assistant United States
Attorney;*

United States Postoffice and
Courthouse Bldg., Los Angeles (12),
Attorneys for Appellee.

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No. 11062.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALFRED LLOYD SAUNDERS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

Jurisdiction.

The United States District Court for the Southern District of California had jurisdiction of the cause under Section 311 of the Selective Training and Service Act of 1940, 54 Stat. 885 (50 U. S. C. App. 311) and Section 24 of the Judicial Code (28 U. S. C. 41 (2)). The offense charged in the indictment was committed in the County of Los Angeles, State of California, within the jurisdiction of the District Court. This Court has jurisdiction of the appeal under Section 128 of the Judicial Code (28 U. S. C. 225 (a) and (d)).

Statutes and Regulations Involved.

Sections 10(a)(2) and 11 of the Selective Training and Service Act of 1940, 54 Stat. 893, as amended Dec. 5, 1943, c. 342, 57 Stat. 597 (50 U. S. C. App. 310-311) provide:

Section 10:

“Administrative provisions

(a) The President is authorized—

* * * * *

(2) to create and establish a Selective Service System, and shall provide for the classification of registrants and of persons who volunteer for induction under this Act on the basis of availability for training and service, and shall establish within the Selective Service System civilian local boards, civilian appeal boards, and such other agencies, including agencies of appeal, as may be necessary to carry out the provisions of this Act. There shall be created one or more local boards in each county or political subdivision corresponding thereto of each State, Territory, and the District of Columbia. Each local board shall consist of three or more members to be appointed by the President, from recommendations made by the respective Governors or comparable executive officials. No member of any such local board shall be a member of the land or naval forces of the United States, but each member of any such local board shall be a civilian who is a citizen of the United States residing in the county or political subdivision corresponding thereto in which such local board has jurisdiction under rules and regulations prescribed by the President. Such local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the

right of appeal to the appeal boards herein authorized all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe. Appeal boards within the Selective Service System shall be composed of civilians who are citizens of the United States. The decision of such appeal boards shall be final in cases before them on appeal unless modified or changed by the President as provided in the last sentence of section 5(1) of this Act. No person who is an officer, member, agent, or employee of the Selective Service System, or of any such local or appeal board or other agency, shall be excepted from registration, or deferred from training and service, as provided for in this Act, by reason of his status as such officer, member, agent, or employee."

Section 11: Offenses and punishment.

"Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or non-liability of himself or any

other person for service under the provisions of the Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so, shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act. Precedence shall be given by courts to the trial of cases arising under this Act."

Section 633.21 of the Selective Service Rules and Regulations, provides:

"633.21. Duty of registrant to report for and submit to induction. (a) When the local board mails to a registrant an Order to Report for Induction (Form

150), it shall be the duty of the registrant to report for induction at the time and place fixed in such order. If the time when the registrant is ordered to report for induction is postponed, it shall be the continuous duty of the registrant to report for induction upon the termination of such postponement and he shall report for induction at such time and place as may be fixed by the local board. * * *

“(b) Upon reporting for induction, it shall be the duty of the registrant: * * * (5) to submit to induction * * *.”

Statement of the Case.

On about April 18, 1945, appellant was indicted in the United States District Court for the Southern District of California, Central Division in one count [R. 2-3], charging violation of the Selective Training and Service Act of 1940 (*supra*, p. 2), in that he wilfully, knowingly, and unlawfully failed and neglected to submit to induction into the Armed forces of the United States after having been duly notified and ordered to do so, thereby willfully and unlawfully failing and neglecting to perform a duty required by him under the Act and the rules and regulations promulgated pursuant to it.

Appellant, on May 2, 1945, filed a demurrer to the indictment, which in substance challenged the sufficiency of the indictment on the ground that it purported to state a violation of the Act and the applicable regulations, which appellant contended, were violative of his constitutional rights in that he was, by the order of the draft board forced to report and submit to induction, and forced to serve in the armed forces although he was a conscientious objector, and that the question of whether he was in

fact a conscientious objector had been determined by the local draft board adversely to the appellant, whereas, the appellant contended, such a determination could only be made by himself and not by the local draft board [R. 5-10].

On May 7, 1945, the district judge overruled the demurrer [R. 10-11] and appellant thereupon entered a plea of not guilty to the indictment (*id.*). On May 7, 1945, also, appellant, appearing *pro. per.* [R. 2-3], although he was duly advised of his right to have counsel appointed on his behalf and to a trial by jury, declined counsel and waived a jury trial [R. 11, 23, 29, 30]. During the proceeding, however, the trial court requested two local counsel who were present in the courtroom to consider the rights of the appellant and called upon them for their opinion as to the correctness of appellant's proposed steps and position [R. 28-29].

On May 8, 1945, appellant was tried before the district court without a jury [R. 11-12, 30-46] and, after the introduction of testimony by the Government and by appellant [R. 12, 31-46], as well as following denial of appellant's motions for a directed verdict, the district court found appellant guilty of the violation charged in the indictment. [R. 42.] This case was thereupon referred to a probation officer for investigation and report to be made on May 21, 1945 [R. 12-13, 42].

On May 21, 1945, the district court sentenced appellant to imprisonment for a term of 18 months [R. 14-15, 46].

Appellant filed notice of appeal, together with his grounds of appeal, on May 22, 1945 [R. 15-16], and filed an assignment of errors on June 11, 1945 [R. 49-50].

Summary of Facts.

There is no dispute as to the facts in the instant case.

Pursuant to the provisions of the Selective Training and Service Act of 1940 [R. 31], appellant registered, and thereafter filed a Selective Service questionnaire with his local draft board [R. 31-32]. At the same time appellant filed a conscientious objector's form, notifying his local draft board that he considered himself to be a conscientious objector, and requested that he be classified accordingly [R. 35-36, 37].

On May 22, 1944 appellant was classified by his local draft board in Class I-A (available for military service), and notice of such classification was mailed to him on the following day [R. 32]. Thereafter, appellant appealed from his local board's classification to the Selective Service appeal board, which also classified appellant in Class I-A [R. 32], after appellant had been accorded a hearing upon his claim for a conscientious objector's status [R. 37-38 40-41; Gov. Exh. 6] and the hearing officer had reported that he did not consider appellant to be a conscientious objector under the Act [Gov. Exh. 6].

On December 10, 1944, the local draft board sent to appellant an order to report for induction on January 2, 1945 [R. 32; Gov. Exh. 4]. Pursuant to the order, appellant reported on January 2, 1945 to the induction center, and was asked to return on January 5, 1945, which he did [R. 33]. At the induction center appellant advised that he did not intend to submit to induction inasmuch as he was a conscientious objector. Appellant departed from the induction center without being inducted [R. 33].

At the trial appellant sought a review of the draft board's classification and offered evidence which he conceived to be in support of his contention that he was improperly classified by the draft boards [R. 34-35].

ARGUMENT.

Appellant's basic contentions in this case are: (1) that the district court erred in failing to review appellant's classification accorded him by the Selective Service boards; and (2) that the local draft board and the appeal board, by classifying him Class I-A, rather than as a conscientious objector (Class I-A-O, or Class IV-E), violated his rights under the First Amendment to the Constitution guaranteeing him freedom of religion. Appellant is in error in both respects.

It is settled, of course, that the propriety of a registrant's classification by the Selective Service boards under the Selective Training and Service Act, is not reviewable upon a criminal prosecution for failure to comply with the orders of the local board. *Falbo v. United States*, 320 U. S. 549. In that case the Supreme Court stated in part (pp. 553-555):

"The connected series of steps into the national service which begins with registration with the local board does not end until the registrant is accepted by the army, navy, or civilian public service camp. Thus a board order to report is no more than a necessary intermediate step in a united and continuous process designed to raise an army speedily and efficiently.

"In this process the local board is charged in the first instance with the duty to make the classification of registrants which Congress in its complete discretion saw fit to authorize. Even if there were, as

the petitioner argues, a constitutional requirement that judicial review must be available to test the validity of the decision of the local board, it is certain that Congress was not required to provide for judicial intervention before final acceptance of an individual for national service. The narrow question therefore presented by this case is whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for wilful violation of an order directing a registrant to report for the last step in the selective process.

"We think it has not. The Act nowhere explicitly provides for such review and we have found nothing in its legislative history which indicates an intention to afford it. The circumstances under which the Act was adopted lend no support to a view which would allow litigious interruption of the process of selection which Congress created. To meet the need which it felt for mobilizing national manpower in the shortest practicable period, Congress established a machinery which it deemed efficient for inducting great numbers of men into the armed forces. Careful provision was made for fair administration of the Act's policies within the framework of the selective service process. But Congress apparently regarded 'a prompt and unhesitating obedience to orders' issued in that process 'indispensable to the complete attainment of the object' of national defense. *Martin v. Mott*, 12 Wheat, 19, 30. Surely if Congress had intended to authorize interference with that process by intermediate challenges of orders to report, it would have said so.

“Against this background the complete absence of any provision for such challenges in the very section providing for prosecution of violations in the civil courts permits no other inference than that Congress did not intend they could be made.”

And in *Enge v. Clark*, 144 Fed. (2d) 638, a *habeas corpus* proceeding, this Court adopted the holding in the *Falbo* case, and stated (p. 639):

“The petition contends that appellant’s imprisonment is (1) illegal and in violation of the provisions of the Selective Training and Service Act of 1940, and the Rules, Regulations, and Orders thereunder; (2) illegal by virtue of arbitrary, discriminatory, unfair, capricious enforcement and administration of said Act; and (3) illegal in that it deprives the appellant of due process of law as guaranteed by the Fifth Amendment to the Constitution.

“Similar alleged error in the action of the Board was held not available as a defense in a criminal prosecution for failure to perform a Board’s order to report for induction into the armed forces in *Falbo v. United States*, 320 U. S. 549, 64 S. Ct. 346. Appellant seeks to distinguish the *Falbo* decision on the ground that in the instant case direct relief is sought in this *habeas corpus* proceeding before trial under the indictment. While there is such a difference between the two cases, we are of the opinion that the ratio decidendi of *Falbo v. United States* controls here.”

Consequently, the district court had no power to review appellant's classification by the Selective Service boards, and appellant had no right to raise that issue upon the trial in the criminal prosecution for failure to obey the draft board's orders.

There is likewise no merit to appellant's contention that the Selective Service boards lack power to pass on his claim to classification as a conscientious objector. In this respect, appellant appears to base his argument upon the theory that since the determination would involve a matter of religion, the factual findings necessarily involved are beyond the power of the administrative boards under the Act. It is settled, of course, that exemption from military service is a matter of legislative discretion rather than Constitutional mandate. *United States v. Macintosh*, 283 U. S. 605, 622; *Hamilton v. Regents*, 293 U. S. 245, 263-264; *Rose v. United States*, 129 F. (2d) 204, 210 (C. C. A. 6). Consequently, it is plain that no Constitutional barrier exists in respect to delegating the fact finding function with reference to the registrant's conscientious objector status to the Selective Service boards, and, as recognized in the *Falbo* decision, 320 U. S. 549, and Section 10(a)(2) of the Selective Training and Service Act, Congress has appropriately delegated that function to such boards.

Under the *Falbo* decision, the sole issue at appellant's trial was whether he knowingly failed to comply with the order of his draft board. On that issue the Government's proof was conclusive, and is not now in dispute.

Conclusion.

No questions of law or fact exist in this case which would adversely affect the judgment below. The judgment should be affirmed.

Respectfully submitted,

CHARLES H. CARR,
United States Attorney;

JAMES M. CARTER,
*Assistant United States
Attorney;*

WILLIAM STRONG,
*Special Assistant to the
United States Attorney;*

WM. P. HAUGHTON,
*Assistant United States
Attorney;*
Attorneys for Appellee.

No. 11062.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALFRED LLOYD SAUNDERS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

A. L. WIRIN and

J. B. TIETZ,

257 South Spring Street, Los Angeles 12,
Attorneys for Appellant Alfred Lloyd Saunders.

FILED

MAY 7 - 1948

PAUL P. O'BRIEN,



The Myers Legal Press, Los Angeles. Phone VAndike 9007. ~~CLERK~~

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No. 11062.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALFRED LLOYD SAUNDERS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

Preliminary.

Appellant appeared in *Propria Persona* in the District Court and also in the United States Circuit Court of Appeals for the Ninth Circuit. By substitution, appellant is now represented by counsel above, who present this Petition for Rehearing.

*To the Honorable United States Circuit Court of Appeals,
for the Ninth Circuit, and the Judges Thereof:*

Appellant, above named, presents this, his petition for rehearing, and respectfully prays that the opinion of this Honorable Court, filed April 5, 1946, and the judgment of the court, entered pursuant thereto, be withdrawn and

vacated and that judgment be entered herein reversing the decision and judgment of the United States District Court for the Southern District of California and adjudging appellant not guilty of the crime charged.

As grounds for this petition, appellant urges:

1. This Court overlooked the application to this case of the recent *Estep* and *Smith* (*Estep v. United States* (No. 292) U. S., decided February 4, 1946) decisions of the Supreme Court of the United States in that in actuality an issue of arbitrary and discriminatory classification is involved herein.

2. As to the grounds of appeal 3 and 4, each of which is hereby incorporated herein by reference to page 50 of the record, this Court overlooked uncontroverted facts of record, the clear and express provisions of the Selective Training and Service Act and well established principles of law applicable thereto.

ARGUMENT.

This case involves denial of due process by the Local Draft Board and a refusal by the trial court to consider and review the resulting jurisdictional question.

Both the appellant's artless *Propria Persona* presentation of his testimony to the trial court and in his briefs and argument to this Court failed to develop and point up his true position. The record, nevertheless, justified and supports it.

I.

The Trial Court Erred in Failing to Recognize That the Case Involved a Question of Arbitrary Action by the Local Board, and Erred in Refusing to Review Said Action.¹

Although the appellant generously credited the local board with sincerity and good motives in its classification of him [R. 36 and as quoted in this Court's opinion], the Record actually shows arbitrary and discriminatory action by the local board in that all the evidence before the board supported appellant's claim to a IV-E (conscientious objector's) classification. The trial court therefore erred in refusing to consider the evidence and to adjudge it arbitrary and discriminatory. Although the entire file of the draft board was admitted in evidence and the appellant was permitted to relate his testimony in full the trial court obviously felt bound not to consider it and did not consider it.

"The Court: Well, the difficulty of the situation is that the Court has no power to review classifications of the Draft Board" [R. 38].

Again,

" . . . I, as a Judge of the United States District Court, have no right, no power, under the law, to

¹The identical point arose in the recently argued case of *Berman v. United States*, No. 10953. The Court has not yet announced its decision in the *Berman* case. The appeal was heard by this Court *en banc*. We respectfully submit the *Berman* and instant cases are indistinguishable on this point.

review that action of the Draft Board, provided it shows on its face that the regular administrative processes were carried out. In this proceeding I haven't any choice." [R. 42.]

Again,

" . . . I could ignore that testimony entirely and just take the Record and your statement, and as a matter of law I have no choice, you still, technically, are guilty under the law." [R. 43.]

What did the Court have in mind by the phrase "as a matter of law?" [R. 43.]

At the time the trial court spoke the *Falbo* case (*Falbo v. United States*, 320 U. S. 549) was generally considered the embodiment of the governing principles relative to review. Practically all United States Judges agreed. In the Supreme Court's *Estep* decision, Mr. Justice Frankfurter's anguished comment in his separate opinion well summarizes the current attitude: "Such has been the construction of more than forty judges in the Circuit Courts of Appeal . . . have ruled that judicial review of a draft board classification is not available in a criminal prosecution, even though the registrant has submitted to the preinduction physical examination."

The trial court, while otherwise scrupulously and courteously fair to appellant, used the current, legal yardstick in delimiting his power. This we now know was erroneous. In short, the District Judge failed to review the evidence to determine whether there is "a basis in fact for the classification which it (the Board) gave the registrant," as required by the *Estep* case (Pamphlet opinion, p. 7). (See footnote 14 in *Estep* opinion.)

II.

The Local Board Made an Error of Law That the Trial Court Should Have Recognized and Corrected by a Judgment of Acquittal.²

The appellant, to corroborate his asserted claim to a conscientious objector's classification testified he had presented to the board a personal course of action consistent with and in support of his claims. This was briefly, but well summarized by the trial court:

"The Court: And that you showed your conscientious objector's viewpoint when you were originally classified, by filing a conscientious objector's form; that you substantiated that position when you refused to accept the discipline of the Army and spent some seven months in the guardhouse, when all you had to do was to accept a noncombatant status in the military forces and work in the hospital?

The Defendant: Yes." [R. 41.]

The attitude of the draft authorities, and the Government's attack on his position, was that a non church member could not qualify under the terms of the Selective Training and Service Act of 1940 requiring "religious training and belief." The cross-examination of appellant covered only the single point of appellant's not belonging to any Church! [R. 39, 40.]

At the close of this single-point cross-examination the Court restated the appellant's position (and indirectly

²This point, too, is discussed fully in the briefs filed in this Court in the *Berman* case, No. 10953.

summarized the basis of the denial of appellant's claim to a conscientious objector's classification), thus:

"The Court: That statement is predicated upon this thought, as I understand it: You believe that a man may be a conscientious objector within the meaning of the Congress when it passed the Selective Service Act and provided for such classification, regardless of the fact that he is not a Jehovah Witness, or a Presbyterian, or a Catholic, or a Quaker, or belongs to any other organized church; that he may be just as good a conscientious objector without belonging to any organized group? So far that is your position?

The Defendant: Yes." [R. 41.]

At the conclusion of this restatement of appellant's position the court declared itself powerless "as a matter of law" [R. 43]. It is to be noted that the trial court willingly agreed to ignore the F. B. I. testimony as not necessary to a determination of the case [R. 43], but it must be remembered that the only possible adverse evidence to the claim and the evidence of appellant for a IV-E classification, were the fragments of the F. B. I. investigatory reports presented to the Hearing Officer, and if his recommendation and the final decision of the Appeal Board can be said to have any support at all it rested on this F. B. I. "evidence." Our present argument, however, is not that there was no evidence whatever to support the classification but that the classification was made on the basis that a registrant, no matter how demonstrably sincere, was not entitled to a conscientious objector's classification if he did not belong to a Church. We submit this action of the draft board was based on an erroneous interpretation of the law.

The selective service authorities construed the phrase in the Act "by reason of religious training and belief" literally. It has been held, in a well reasoned opinion (*United States v. Downer*, 135 F. (2d) 521) that the origin of a scruple against participating in war could be philosophical and the registrant need not belong to a church. In the *Downer* case the circuit court reversed the district court, holding that a misconstruction of the Act of such a nature was an error of law.

Conclusion.

WHEREFORE, appellant prays that the order and judgment heretofore entered herein affirming the judgment of the court below, be set aside and held for naught, and that this petition for rehearing be granted and the court render an order reversing the judgment of the court below. Appellant prays for such other and further relief to which he may show himself justly entitled in the premises.

Respectfully submitted,

A. L. WIRIN and

J. B. TIETZ,

By J. B. TIETZ,

Attorneys for Appellant Alfred Lloyd Saunders.

Certificate.

I, the undersigned counsel for appellant, do hereby certify that the foregoing petition for rehearing is prepared and filed in good faith so that justice may be done, and not for the purpose of delay.

J. B. TIETZ.

No. 11063

United States
Circuit Court of Appeals
For the Ninth Circuit.

RICHARD ROLAND HAUGEN,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Eastern District of Washington,
Southern Division

FILED

OCT 5 - 1945

PAUL P. O'BRIEN,
CLERK

No. 11063

United States
Circuit Court of Appeals
For the Ninth Circuit.

RICHARD ROLAND HAUGEN,
Appellant,
vs.
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Upon Appeal from the District Court of the United States
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In the District Court of the United States for the
Eastern District of Washington, Southern
Division

No. (C-3950)—C-7785

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RICHARD ROLAND HAUGEN,

Defendant.

INDICTMENT

Vio: Sec. 72 and 73, Title 18 U.S.C.A. Making,
Forging, Counterfeiting, Uttering, Publishing
and Possession of Obligations of the United
States and Other Writings.

The Grand Jurors of the United States of America, for the Eastern District of Washington, duly impaneled, sworn and charged to inquire into and concerning the commission of crime within said District, upon their official oaths do find, charge and present:

COUNT ONE

That Richard Roland Haugen, heretofore, to-wit, on or about the 19th day of April, 1944, and subsequent thereto, at Hanford, in the County of Benton, in the Southern Division of the Eastern District of Washington, and within the jurisdiction of this Court, then and there being, did knowingly, willfully, unlawfully and feloniously, knowing the same to be false, fraudulent, spurious and counterfeit,

have in his possession with intent that they be uttered and published and put off as true, approximately 966 false, fraudulent, spurious and counterfeit meal tickets, purporting on their face to have been issued by the Olympic Commissary Company, a corporation, which was at said time and agency of the United States of America and of the United States Army Engineer Corps engaged in the construction of a defense project at Hanford, Washington, known as the Hanford Engineer Works; that one of the functions of the said The Olympic Commissary Company was to furnish and dispense meals to workmen employed at the Hanford Engineer Works; that the food and supplies from which said meals were prepared and dispensed were at all times herein mentioned the property of the United States of America; that the valid meal tickets, of which those referred to herein were spurious and counterfeit counterparts, were sold by the Olympic Commissary Company to workmen engaged at the Hanford Engineer Works at a fixed purchase price and the proceeds from the sale of said meal tickets became the property of the United States of America; that the said spurious and counterfeit meal tickets possessed by the defendant were not printed, sold, issued or authorized by the United States of America, The Olympic Commissary Company, or any [1*] lawful representative of either, but were ordered and purchased by the defendant from one George F. Allen, a printer at Tacoma, Washington, and were intended by said defendant to be used by

*Page numbering appearing at foot of page of original certified Transcript of Record.

himself and others for the purchase of food and meals from The Olympic Commissary Company without lawful payment therefor and with intent to defraud the United States of America;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

COUNT TWO

That Richard Roland Haugen, heretofore, to-wit, on or about the 19th day of April, 1944, and subsequent thereto, at Hanford, in the County of Benton, in the Southern Division of the Eastern District of Washington and within the jurisdiction of this Court, then and there being, did knowingly, willfully, unlawfully and feloniously, and knowing the same to be false, falsely made, spurious and counterfeited, publish and utter as true to one J. L. Holloway, six (6) false, fraudulent, altered, spurious and counterfeit meal tickets, purporting on their face to have been issued by The Olympic Commissary Company, a corporation, which was at said time an agency of the United States of America and of the United States Army Engineer Corps engaged in the construction of a defense project at Hanford, Washington, known as the Hanford Engineer Works; that one of the functions of the said The Olympic Commissary Company was to furnish and dispense meals to workmen employed at the Hanford Engineer Works; that the food and supplies from which said meals were prepared and dispensed were at all times herein mentioned the property of the

United States of America; that the valid meal tickets, of which those referred to herein were spurious and counterfeit counterparts, were sold by The Olympic Commissary Company to workmen engaged at the Hanford Engineer Works at a fixed purchase price and the proceeds from the sale of said meal tickets became the property of the United States of America; that the said spurious and counterfeit meal tickets possessed by the defendant were not printed, sold, issued or authorized by the United States of America, The Olympic Commissary Company, or any lawful representative of either, but were ordered and purchased by the defendant from one George F. Allen, a printer at Tacoma, Washington, and were intended by said defendant to be used by said J. L. Holloway for the purchase of food and meals from The Olympic Commissary Company without lawful payment therefor to the United States of America or to the Olympic Commissary Company, and with intent to defraud the United States of America on the part of him, the said defendant; [2]

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

COUNT THREE

That Richard Roland Haugen, heretofore, to-wit, on or about the 19th day of April, 1944, and subsequent thereto, at Hanford, in the County of Benton, in the Southern Division of the Eastern District of Washington and within the jurisdiction of this Court, then and there being, did knowingly, will-

fully, unlawfully and feloniously, and knowing the same to be false, falsely made, spurious and counterfeited, publish and utter as true to one R. P. McDonald, one (1) false, fraudulent, altered, spurious and counterfeit meal ticket, purporting on its face to have been issued by The Olympic Commissary Company, a corporation, which was at said time an agency of the United States of America and of the United States Army Engineer Corps engaged in the construction of a defense project at Hanford, Washington, known as the Hanford Engineer Works; that one of the functions of the said The Olympic Commissary Company was to furnish and dispense meals to workmen employed at the Hanford Engineer Works; that the food and supplies from which said meals were prepared and dispensed were at all times herein mentioned the property of the United States of America; that the valid meal tickets, of which those referred to herein were spurious and counterfeit counterparts, were sold by The Olympic Commissary Company to workmen engaged at the Hanford Engineer Works at a fixed purchase price and the proceeds from the sale of said meal tickets became the property of the United States of America; that the said spurious and counterfeit meal tickets possessed by the defendant were not printed, sold, issued or authorized by the United States of America, The Olympic Commissary Company, or any lawful representative of either, but were ordered and purchased by the defendant from one George F. Allen, a printer at Tacoma, Washington, and were intended by said defendant to be used by

said R. P. MacDonald for the purchase of food and meals from The Olympic Commissary Company without lawful payment therefor to the United States of America or to The Olympic Commissary Company, and with intent to defraud the United States of America on the part of him, the said defendant;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Dated this 11th day of August, 1944.

EDWARD M. CONNELLY

United States Attorney

HARVEY ERICKSON,

Assistant United States

Attorney

A True Bill:

HOWARD C. CLEAVINGER

Foreman, Grand Jury. [3]

Presented to the Court by the Foreman of the Grand Jury, in open Court, in the presence of the Grand Jury and filed in the United States District Court for the Eastern District of Washington.

Aug. 11, 1944.

A. A. LaFRAMBOISE,

Clerk.

[Title of Court and Cause.]

O. Sandvig, Attorney for Defendant.

Now, on this 18th day of August, 1944, into court comes the defendant Richard Roland Haugen for arraignment under the Indictment heretofore filed against him, and being interrogated by the Court as to his plea thereto, defendant answers that he desires to enter a plea of Not Guilty, which plea is received by the Court and ordered entered on the records of the Court.

[Endorsed]: Filed Aug. 18, 1944. A. A. La-Framboise, Clerk.

[Title of Court and Cause.]

WAIVER OF JURY

I, Richard Roland Haugen, defendant in the above-entitled case, after being advised of my constitutional rights to trial by jury, hereby expressly waive my right to be tried by jury and consent that the trial of the above-entitled cause *by* before the Court without a jury.

Dated this 5th day of October, 1944.

RICHARD ROLAND HAUGEN
R. R. HAUGEN

Witness:

O. SANDVIG
Attorney for Defendant [4]

[Title of Court and Cause.]

OPINION OF THE COURT

Edward M. Connelly, United States Attorney, Spokane, Wash.

Harvey Erickson, Assistant United States Attorney, Spokane, Wash., Attorneys for Plaintiff.

Ole Sandvig, Yakima, Washington, Attorney for Defendant.

Schwellenbach, District Judge.

In an indictment containing three counts, defendant is charged with possessing, publishing and uttering counterfeit meal tickets in violation of Sections 72 and 73, Title 18 U.S.C.A. In each count of the indictment, it is charged that the meal tickets purported to have been issued by the Olympic Commissary Company, a corporation, which it is alleged was an agency of the United States of America having, as one of its functions, the furnishing and dispensing of meals to workmen employed upon a defense project at Hanford, Washington, under the supervision of the United States Army Engineers Corps. The indictment alleges that the defendant possessed, uttered and published the counterfeit meal tickets with intent to defraud the United States of America. The defendant entered a plea of not guilty, a jury was waived and the Government's testimony was submitted to the Court. The defendant submitted no testimony and the case was taken under advisement.

The plaintiff's testimony proved without doubt that the defendant, who had been an employee at

Hanford, Washington, caused to be printed a thousand meal tickets resembling in form those issued by the Olympic Commissary. There is no question but that he published and uttered the meal tickets as alleged in counts 2 and 3 of the indictment and that, when arrested, he had in his possession 966 of such meal tickets as alleged in count 1 of the indictment. The problem in the case arises in determining whether the Government sustained its burden of proving that the Olympic Commissary Company was an agency of the United States and that the defendant possessed and uttered the counterfeit tickets with intent to defraud the United States. During the trial, defendant's counsel objected to the introduction of each portion of the evidence [5] that tended to support these conclusions. Since the case was being tried without a jury, I admitted the evidence, subject to defendant's objection, with the understanding that I would pass on the validity of the objections after submission of arguments and briefs by respective counsel.

The testimony shows that, in February, 1943, the Corps of Army Engineers commenced construction of a tremendous project at Hanford, Washington, known as the Hanford Engineering project. The property acquired for the project through condemnation proceedings in this Court totaled three hundred seventy thousand acres. The purpose for which the project is being constructed is a military secret of high order. Whether the Olympic Commissary Company is an agency of the United States and whether, by the use of the counterfeit meal tickets,

defendant might have perpetrated a fraud upon the United States depends upon the contract under which the Hanford Engineering Project is being constructed and the contract by which Olympic Commissary furnishes meals to the construction employees. The plaintiff called, in support of its contention, R. F. Ebbs, a Major in the United States Corps of Engineers who is executive officer of the Hanford Engineering Works. He testified that the construction work at Hanford was being performed by the E. I. du Pont de Nemours Company as prime contractor. His testimony was that that contract was secret by orders of the War Department through the office of Chief of Engineers. So secret is the contract that he was not permitted even to reveal the names of the individuals signing on behalf of the Government and du Pont. He testified that Olympic Commissary Company had a subcontract with du Pont and that this, also, was secret. He stated: "It is considered that the contracts cover a very important construction and operation job, and it would be detrimental to the country to reveal their contents." He testified that the originals of the contracts were in the office of the Comptroller General in Washington, D. C., and that, while he has not seen the contracts, he had seen copies of them. He stated that he was not an attorney but that he had a very competent legal staff at his command. He declined to reveal the length of the contracts. Having laid this foundation for the justification of refusal [6] to submit the contracts to the Court or the defendant, Major Ebbs then pro-

ceeded to testify orally concerning those provisions of the contract which were pertinent in this controversy. Plaintiff's case on the question of the relationship between Olympic Commissary and the Government and in support of its position that these counterfeit meal tickets were intended to defraud the Government was based exclusively upon this testimony as to the content of the contracts. The one exception was proof in the form of invoices for food which contained a stipulation that title passed to the United States upon delivery to the Olympic Commissary Company. If this defendant were charged with stealing food belonging to the Government, this invoice evidence would be sufficient. Standing alone, it is no proof that Olympic Commissary was a government agency or that defendant intended to defraud the Government. Unquestionably, Major Ebbs' oral testimony, if admissible, was sufficient to justify a conviction in this case. If such oral evidence was inadmissible, plaintiff has failed to make its case.

The right of the Army to refuse to disclose confidential information, the secrecy of which it deems necessary to national defense, is indisputable. *Firth Sterling Steel Company v. Bethlehem Steel Company*, 199 F. 353; *In re Grove*, 180 F. 62. The Army Regulation covering this is quoted in the footnote.¹ The determination of what steps are

¹Army Regulation 380-5 (5)—“Secret Material—a. Documents, information or material, the unauthorized disclosure of which would endanger national security, cause serious injury to the interests

necessary in time of war for the protection of national security lies exclusively with the military and is not subject to court review. *United States v. Hirabayashi*, 320 U.S. 81, 93. The war power embraces every phase of the national defense including the protection of war materials and the members of the armed forces from injury and from the dangers which attend the rise, progress and prosecution of war. *Prize Cases*, 2 Black 635, 671; *Miller v. United States*, 11 Wall 268, 303; *Stewart v. Kahn*, 11 Wall 493, 506; *McKinley v. United States*, 294 U.S. 397.

Implicit in a correct answer to the question as to the admissibility of this oral, secondary evidence is the understanding that the best evidence rule is a preferential rather than an exclusionary one. The rule requiring the production of documents is not a rule requiring evidence but a rule preferring the thing itself to any evidence about the thing. As Chief Justice Marshall said, in *Tayloe v. Riggs*, 26 U.S. 590, 595, "The rule of law is, that the best evidence must be given of which the nature of the thing is capable; that is, that no evidence shall be received which presupposes greater evidence behind in the party's possession or power." On this basis, the courts have recognized many situations under which so-called secondary evidence is admissible. Among these situations is the one where the original document accidentally has been lost or destroyed, *United States v. Pendell*, 185 U.S. 189; *Robertson*

or prestige of the Nation, or any Governmental activity thereof, or would be of great advantage to a foreign nation, shall be classified secret." [7]

v. Pickrell, 109 U.S. 608; *United States v. Sutter*, 21 How. 329; where it has voluntarily been destroyed in the course of business or by mistake, *Tayloe v. Riggs*, *supra*; *McDonald v. United States*, 89 F. (2d) 128; where it is suppressed by the opponent of the party offering it, *Morris v. Vanderen*, 1 Dallas, 64, 65; *Dunbar v. United States*, 156 U.S. 185; where it is detained by a third party who, by reason of privilege, is not compellable to produce it, *De Leon v. Territory, Arizona*, 80 Pac. 348; where it is in possession of a third person who, through collusion with the opponent, refused to produce it, *People v. Powell, California*, 236 Pac. 311; where it is a physical impossibility to remove the writing into court because the characters exist on something firmly fixed to the realty, *Harper v. State, Alabama*, 19 So. 857; where it is a part of an irremovable judicial or public record, *Ronkendorff v. Taylor*, 4 Peters 349, 360; *Cohn v. United States*, 258 F. 355; where the original consists of private books of public importance such as banks and title abstracts, *People v. Hurst*, 41 Mich. 328; *Crawford v. Branch Bank*, 8 Ala. 79. The rule requires the production of the best evidence of which the case admits and that when the evidence offered is clearly substitutory in its nature and the unavailability of the original raises no suspicion of [8] weakness in the substitute, the secondary evidence is admissible.²

²Of persuasive interest in considering this question is the proposed Rule 602 of the Model Code of Evidence promulgated by the American Law Institute.

The Supreme Court stated the rule in this language: "This rule of evidence must be so applied as to promote the ends of justice and guard against fraud or imposition. If the circumstances will justify a well-grounded belief that the original paper is kept back by design, no secondary evidence ought to be admitted; but when no such suspicion attaches and the paper is of that description that no doubt can arise as to the proof of its contents, there can be no danger in admitting the secondary evidence." *Renner v. The Bank of Columbia*, 22 U.S. 581, 596.

In view of the foregoing, I see no merit in defendant's general attack upon this recollection testimony. The admissibility of secondary evidence

Rule 602. Evidence as to Content of Writings; Best Evidence Rule.

As tending to prove the content of a writing, except an official record, no evidence other than the writing itself is admissible unless

- (a) evidence has been introduced sufficient to support a finding that the writing once existed and is not a writing produced at the trial, and the judge finds that, assuming that the writing once existed and is not a writing produced at the trial,
- (i) it is now unavailable for some reason other than the culpable negligence or wrongdoing of the proponent of the evidence, or
- (ii) it would be unfair or inexpedient to require the proponent to produce the writing; * * "

The committee's comment on this Rule was: "This Rule imposes the principle of the so-called best evidence rule which as generally stated makes secondary evidence of the content of the writing inadmissible unless failure to offer the original is satisfactorily explained." [9]

under proper circumstances, in criminal as well as civil cases, has long been recognized. *United States v. Gooding*, 25 U.S. 460, 467. It is *true* that in offering the secondary evidence, plaintiff urges me to tread an unbeaten path. I see no insuperable obstacle to traversing that path. The exigencies of war require the withholding of the original document. Its unavailability is due to no fault or design upon plaintiff's part. The ends of justice will be served rather than thwarted by enabling the Government, in cases involving contracts situated as is this, to prove the pertinent portions of their content by secondary means.

However, the plaintiff here has failed to meet the requirements preliminary to the reception of such evidence. While it is not prevented from presenting such evidence when it seeks so to do, it must present the best evidence available to it. "The principle established by this Court as to secondary evidence in cases like this is, that it must be the best the party has in its power to produce. The rule is to be so applied as to promote the ends of justice and guard against fraud, surprise and imposition." *Cornett v. Williams*, 87 U.S. 266, 246. Major Ebbs testified he had never seen the original contract. His recollection was based upon a view of a copy of the contract. It is universally recognized that, in situations such as this, a copy of the copy will not suffice. The circumstances under which that rule applies were delineated by Mr. Justice Storey in *Winn v. Patterson*, 34 U.S. 662, 676, as follows: "We admit that the rule that a copy of a

copy is not admissible evidence is correct in itself when properly understood and limited to its true sense. The rule properly applies to cases where the copy is taken from a copy, the original being still in existence and capable of being compared with it; for then it is a second remove from the original; or where it is a copy of a copy of a record, the record being in existence, by law deemed as high evidence as the original; for then it is also a second remove from the record." The testimony here shows that the original is in existence in the [10] General Accounting Office. If Major Ebbs, when he checked the copy, had caused a copy of it to be made, that second copy clearly would be inadmissible. Since he could not introduce a copy of the copy, it is clear that he cannot testify as to his recollection of the copy. This follows from the fact that "the fundamental notion of the rule requiring production is that in writings the smallest variations in words may be of importance, and that such errors in regard to words and phrases are more likely to occur than errors in regard to other features of a physical thing." Wigmore on Evidence, 3d ed., sec. 1242. No showing was made that the plaintiff could not produce a witness who had seen the original. No sufficient showing can be made that would justify on security grounds, the withholding of a view of the original from Major Ebbs or some other equally reliable Army officer. If the copy which Major Ebbs viewed was a true copy, no harm can come from the exhibition to him of the original. Of less importance, but worthy of

consideration, is the fact that Major Ebbs is not a lawyer. In view of the immensity of the project, it seems fair to assume that the Army-du Pont contract is lengthy and, perhaps complicated. By the very nature of things, the Court is not permitted to know whether that assumption is correct. Therefore, it seems not unreasonable to me to require that such secondary evidence be supplied by one trained in the art of drawing and construing contracts.

Since the plaintiff has failed to present the best evidence available to it, I am forced to conclude that I should have sustained the objection to the introduction of such testimony. That being true, it is my duty now to disregard it. Without such evidence, plaintiff has failed to sustain its burden that the Olympic Commissary was an agency of the United States and that the counterfeiting of its meal tickets was calculated to defraud the United States.

Therefore, the action must be dismissed.

December 22, 1944.

L. B. SCHWELLENBACH

United States District Judge

[Endorsed]: Filed December 22, 1944. A. A. LaFramboise, Clerk. [11]

[Title of Court and Cause.]

MOTION TO REOPEN TRIAL IN COMPLI-
ANCE WITH COURT'S MEMORANDUM
DECISION

Comes now the plaintiff by Edward M. Connelly, United States Attorney, and Harvey Erickson, Assistant United States Attorney, and respectfully moves the Court to make an order reopening the trial of the above-entitled proceeding which was tried to the Court without a jury, and which is still pending before the Court, in order that plaintiff may meet the requirements of the Court's Memorandum Decision with reference to the testimony of Major R. F. Ebbs relative to his knowledge of the prime contract existing between the United States of America and the E. I. duPont deNemours and Company, relating to the establishment of the defense industrial project at Hanford, Washington.

Plaintiff further respectfully shows to the Court that the matter of securing a member of the Judge Advocate General's Department of the United States Army Engineers, who is familiar with the original prime contract referred to herein and in the Court's Memorandum Decision, and bringing such officer to Yakima as a witness is a comparatively simple matter; that the ends of justice would best be served, as the present lack of "best evidence" as pointed out in the Court's Memorandum Decision, may be supplied in the manner requested herein.

That counsel and the Court in the trial of the above-entitled proceeding were treading upon a comparatively strange field of evidence. That the plaintiff and its attorneys tried the case on a theory of evidence wholly distinct from that upon which the Court predicates its Memorandum Decision.

That the plaintiff's theory was that the United States of America was the owner of the food being dispensed through the Olympic Commissary Company, and which the defendant was charged with seeking to wrongfully divert through the use of counterfeit meal tickets. The Government's proof was confined largely to evidence of ownership of the merchandise used in the preparation of meals by the Olympic Commissary Company which was shown by documentary evidence consisting of the purchase order forms required by the Government and the E. I. duPont deNemours [12] Company, and its subcontractors, including Olympic Commissary Company, in the purchase of merchandise to be converted into meals and food for service upon the Hanford Project, which said purchase orders specifically recited:

"The material to be furnished hereunder is for the benefit of the United States Government and title thereto will pass to the United States Government upon delivery, subject to subsequent inspection and acceptance of the material; if specifications are not met, material may be returned at seller's expense."

That other proof offered by plaintiff in support

of its effort to prove ownership in the United States of America of the food and merchandise converted into meals and sold by the Olympic Commissary Company consisted of certified copies of the various authorities issued by the Secretary of War, and progressing through various stages down to the engineer in charge of the construction of the Hanford Project, to-wit, the witness, Major R. F. Ebbs; that such certified copies of authority designated the powers which Major Ebbs had to purchase, possess and own in the name of the United States, personal property to be used in the construction of the Hanford Project. Other documentary proof and oral evidence in support thereof clearly designated that the United States of America paid for every single item of personal property, merchandise, food and labor in the preparation of meals which were served upon the Hanford Engineer Works Project, and that the E. I. duPont deNemours and Company and its subcontractor, the Olympic Commissary Company, acted only as a disbrusing agent for the United States of America in this connection.

As recited, the case was tried upon this theory because of the confidential character of the prime contract. The Court's opinion indicates that this theory was incorrect, and that the evidence in support thereof was not sufficient to show ownership of food in the United States for the reason that Major Ebbs' evidence with reference to the prime contract, without question, referred to a copy which he had in his possession in connection with his

duties as Army Engineer in charge of the Hanford Engineer Works. In fact, under cross-examination, at page 24, Major Ebbs indicated very clearly that the copy of the prime contract, which he had in his possession, was authenticated by competent authority and was under his jurisdiction. Presumably, it is the copy of the contract under [13] which the entire project at Hanford Engineer Works is conducted. At page 25 of the cross-examination of the Major, he stated that he had seen the contract between the Olympic Commissary Company and E. I. duPont deNemours and Company, and that he had jurisdiction over a copy of it.

For the foregoing reasons it is respectfully requested that the Court reopen this case for the purpose of permitting the Government to call as a witness a member of the Judge Advocate General's Department of the United States Army Engineers who has personally seen the original contract referred to in Major Ebbs' testimony, and who may testify as a legal expert to its contents.

It may further be observed that the defendant will not be prejudiced by this procedure, that the case is still open and the defendant has been on bail since a few days after his arrest.

Respectfully submitted,

EDWARD M. CONNELLY

United States Attorney

HARVEY ERICKSON

Assistant United States
Attorney

[Endorsed]: Filed December 27, 1944.

[Title of Court and Cause.]

ORDER PERMITTING REOPENING

This matter coming on before the above-entitled Court for consideration on this 13th day of February, 1945, and it appearing to the Court that after the filing of the Court's opinion on December 22, 1944, the United States made a motion to reopen the trial in compliance with the Court's Memorandum Decision, that said motion was supported by a memorandum of authorities which was served upon Ole Sandvig, Attorney for the defendant, on January 20, 1945, and it appearing to the satisfaction of the Court that defendant's counsel was ordered to furnish the Court with a memorandum of authorities against plaintiff's motion to reopen the trial on or before February 5, 1945, and it appearing to the satisfaction of the Court that defendant's counsel has failed to furnish the Court with any memorandum of authorities pursuant to Rule 4, Paragraph C-3, [14] of the Civil Rules of the United States District Court for the Eastern District of Washington,

It Is Therefore by the Court Ordered and Decreed that plaintiff's motion to reopen the trial in compliance with the Courts' Memorandum Decision be granted and the plaintiff is permitted to reopen said case to supply the deficiency in proof mentioned in the Court's opinion of December 22, 1944, provided further that the defendant shall have all rights accorded him by law in connection with the reopening of the case by the plaintiff.

Dated this 13th day of February, 1945.

L. B. SCHWELLENBACH

United States District Judge

[Endorsed]: Filed February 13, 1945 [15]

(Excerpt from Yakima Minutes, Journal 5,
Page 217)

April 11, 1945

Court Convened Pursuant to Adjournment,
at 10 A. M.

Present: Honorable Lewis B. Schwellenbach, District Judge, A. A. LaFramboise, Clerk, Edward M. Connelly, U. S. Attorney, Harvey Erickson Assistant U. S. Attorney, Ralph R. Isaacs, Deputy U. S. Marshal.

PROCEEDINGS

[Title of Cause.]

Case called for further testimony, both parties ready.

After the first witness was sworn, Mr. Sandvig objected to the introduction of testimony. Objection overruled.

The following witnesses were sworn and testified on behalf of the Plaintiff, Ralph G. Cornell, Morton K. Barrett.

Plaintiff rested at 11:15 A. M.

Defendant rested without offering any evidence.

After argument of counsel the Court found the Defendant Guilty on all counts.

Defendant's request for pre-sentence investigation granted. Passing of sentence continued to May 1, 1945 at 11:00 a. m. [81]

[Title of Court and Cause.]

ORDER OF TRANSFER

This matter coming on before the above-entitled Court upon application of the defendant in his own proper person,

It Is Hereby Ordered that the above-entitled cause be, and it hereby is, transferred from Yakima in the Southern Division of the Eastern District of Washington, to Spokane in the Northern Division of said District for all proceedings herein.

It Is Further Ordered that the defendant shall report to the United States District Court at Spokane, Washington for sentence and further proceedings herein on May 7, 1945 at the hour of 10:00 A. M., or such other time that may be ordered by Judge Schwellenbach.

Dated this 1st day of May, 1945.

JOHN C. BOWEN

United States District Judge

Presented By:

EDWARD M. CONNELLY

United States Attorney

Approved:

O. SANDVIG

Atty for Deft.

[Endorsed]: Filed, May 1, 1945.

[Title of Court and Cause.]

JUDGMENT AND COMMITMENT

On this 7th day of May, 1945, came the United States Attorney, and the defendant Richard Roland Haugen appearing in proper person, and having waived the presence of his attorney and,

The defendant having been convicted on the judgment of the Court of the offenses charged in the Indictment in the above-entitled cause, to wit: making, forging, counterfeiting, uttering, publishing and possession of obligations of the United States and other writings and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing [82] to the Court, It Is by the Court Adjudged that defendant is guilty as charged in the Indictment, and it is further

Ordered and Adjudged that the defendant, hav-

ing been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of One Year and One Day on Count 1, One Year and One Day on Count 2, One Year and One Day on Count 3, of the Indictment, said imprisonment sentences to run concurrently,

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) L. B. SCHWELLENBACH

United States District Judge.

[Endorsed]: Filed, May 7, 1945.

[Title of Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant: Richard Roland Haugen, Box 32, Hot Springs, Montana.

Name and address of appellant's attorneys: Robertson & Smith, Spokane & Eastern Building, Spokane 8, Washington

Offense: Violation of Sections 72 and 73, Title 18 U.S.C.A.; making, forging, counterfeiting, uttering, publishing, and possessing of obligations of the United States and other writings.

Date of judgment: May 7, 1945.

Brief description of judgment or sentence: One

year and one day on Count I; one year and one day on Count II; one year and one day on Count III of the indictment; said imprisonment sentences to run concurrently.

I, Richard Roland Haugen, the above-named appellant, hereby appeal [83] to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above mentioned on the grounds set forth below.

RICHARD ROLAND HAUGEN
Appellant

Dated May 11, 1945.

Received copy of the foregoing notice of appeal, with grounds of appeal annexed, this 11th day of May, 1945.

EDWARD M. CONNELLY
United States District Attorney and Attorney for
Plaintiff

GROUND OF APPEAL:

1. Error of the Court in overruling defendant's plea of former jeopardy by reason of defendant's having been put upon trial for the same offense in case No. C-3929, entitled "United States of America, Plaintiff, vs. Richard Roland Haugen, Defendant, in the above entitled Court, in which case the Court sustained an oral demurrer to the indictment after the opening statement in behalf of the plaintiff.

2. Error of the Court in admitting over the objection of the appellant hearsay evidence as to

the contents of the contract between the United States of America and E. I. duPont deNemours & Company and the sub-contract between the duPont Company and Olympic Commissary Company.

3. Error of the Court in permitting the Government to introduce over objection oral secondary evidence as to the legal effect and contents of said contract, particularly between the duPont Company and Olympic Commissary Company, said sub-contract being the best evidence.

4. Error of the Court in failing to enter proposed order of dismissal with prejudice after the written opinion of the Court filed December 22, 1944, stating, "The action must be dismissed."

5. Error of the Court in entering the order permitting reopening, filed February 13, 1945.

6. Error of the Court in admitting in evidence additional hearsay testimony relating to the contract between the Government and the duPont Company after such reopening.

7. That there was a total failure of proof and no substantial evidence to prove beyond a reasonable doubt the intent of the defendant to defraud the United States or an agency thereof. [84]

8. That the verdict of the Court and judgment of conviction is contrary to law and the evidence.

The foregoing succinct statement of the grounds

of appeal will be amplified and added to in the assignments of error.

ROBERTSON & SMITH

By DEL CARY SMITH, Jr.

Attorneys for Richard

Roland Haugen

[Endorsed]: Filed, May 11, 1945

General Casualty Company of America

[Title of Cause.]

BAIL BOND PENDING DETERMINATION
OF APPEAL

Know All Men by These Presents: That we Richard R. Haugen, as Principal, and the General Casualty Co., a Corporation as surety, are held and firmly bound unto the United States of America, in the full and just sum of One Thousand (\$1000.00) Dollars, to be paid to the United States of America to which payment well and truly to be paid, we bind ourselves and heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 11th day of May in the year of our Lord One Thousand Nine Hundred and

Whereas, Lately at the April term of the District Court of the United States, for the Eastern District of Washington, Southern Division, in a suit pending in said court, between the United States of

America, plaintiff and Richard R. Haugen, defendant, a judgment and sentence was rendered against the said defendant Richard R. Haugen and the said Richard R. Haugen has appealed to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment and sentence in the aforesaid suit.

Now, the condition of the above obligation is such that if the said Richard R. Haugen shall appear either in person or by attorney in the United States Circuit Court of appeals for the Ninth Circuit Court on such day or days as may be appointed for the hearing of said cause, in said Court, and shall prosecute his said appeal, and abide by and obey all orders made by the United States Circuit Court of Appeals for the Ninth Circuit in said cause, and shall surrender himself in the execution of the judgment and sentence appealed from, as said Court may direct, if the judgment and sentence against [85] him shall be affirmed, or the appeal is dismissed; and if he shall appear for trial in the District Court of the United States, for the Eastern District of Washington, Southern Division, such day or days as may be appointed for retrial by said District Court and abide by and obey all orders made by said Court, provided the judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Ninth Circuit, then the

above obligation to be void; otherwise to remain in full force, virtue and effect.

[Seal]

GENERAL CASUALTY COM-
PANY OF AMERICA

By ANTONY PANELLA

Attorney-in-Fact

RICHARD R. HAUGEN,
Principal.

Bond approved as to Form:

EDWARD M. CONNELLY
United States District
Attorney

Bond Approved this 11th day of May, 1945.

L. B. SCHWELLENBACH,
Judge.

Address: Box No. 32 Hot Springs, Mont.

[Endorsed]: Filed, May 11, 1945

(Excerpt from Court Minutes at Spokane)
(Journal 16, page 823)

Saturday—May 12, 1945
In Chambers

[Title of Cause.]

HEARING IN RE RULE 7

Now on this 12th day of May, 1945, counsel were called before the Court under the provisions of Rule 7 of the Rules of Practice and Procedure after finding of guilt in criminal cases, Mr. Erick-

son appearing for the plaintiff, and Mr. Del Cary Smith appearing for the defendant.

June 18, 1945 fixed as the time for filing Bill of Exceptions and Assignments of Error and for Settling the Bill of Exceptions. [86]

[Title of Court and Cause.]

ORDER OF EXTENSION OF TIME FOR THE
SETTLEMENT AND FILING OF BILL
OF EXCEPTIONS, ASSIGNMENTS OF
ERROR, AND PRAECIPE

Upon the application of the defendant-appellant, Richard Roland Haugen, and upon his showing of good cause therefor, it is

Ordered that the time of the defendant-appellant, Richard Roland Haugen, within which to procure to be settled and to file his bill of exceptions herein, and in which to file his assignments of error and praecipe herein in connection with his aforesaid appeal be and it is hereby extended to and including the 18th day of June, 1945.

Dated this 5th day of June, 1944.

L. B. SCHWELLENBACH

United States District Judge

Approved June 2, 1945:

EDWARD M. CONNELLY

United States Attorney and

Attorney for Plaintiff

ROBERTSON & SMITH

By DEL CARY SMITH Jr.

Attorneys for Defendant.

[Endorsed]: Filed, June 5, 1945 [87]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the above-named Court:

Will you please prepare, duly certify, and send to the United States Circuit Court of Appeals for the Ninth Circuit a transcript of the record in the above-entitled case for use in the appeal of the defendant, Richard Roland Haugen, to the said Circuit Court of Appeals from the judgment entered in the above-entitled case, by including in said transcript the following items from the files and records of the above-entitled case in the District Court deemed necessary for a full and complete consideration of said appeal:

1. Indictment, filed August 11, 1944.
2. Arraignment and Plea, filed August 18, 1944.
3. Waiver of Jury Trial, filed October 5, 1944.

4. Opinion of the Court, filed December 22, 1944.

5. Motion to Reopen Trial in compliance with Court's Memorandum Decision, filed December 27, 1944.

6. Order Permitting Reopening, filed February 13, 1945.

7. Minutes of Hearing, Southern Division, April 11, 1945.

8. Order of Transfer, filed May 1, 1945.

9. Judgment and Sentence filed May 7, 1945.

10. Notice of Appeal (Grounds of Appeal annexed), filed May 11, 1945.

11. Bail Bond Pending Determination of Appeal.

12. Order of Extension of Time for the Settlement and Filing of Bill of Exceptions, Assignments of Error, and Praeipe, filed June 5, 1945.

13. Order Giving Directions for Preparation of Record on Appeal, entered May 12, 1945 (page 823, Journal 16).

14. All exhibits received in evidence.

15. Order Settling and Certifying Bill of Exceptions, filed June 18, 1945.

16. Assignments of Error, filed June 18, 1945.

17. Praeipe for Transcript of Record, filed June 18, 1945.

Said transcript of record to be prepared and filed in the United States Circuit Court of Appeals for the Ninth Circuit as required by law and [88] the Rules of said Circuit Court of Appeals.

Dated June 18, 1945.

Respectfully,

ROBERTSON & SMITH

By DEL CARY SMITH, Jr.

Attorneys for Defendant-

Appellant, Richard Roland
Haugen

Service of two copies of the appellant's Praecipe
is hereby acknowledged this 18th day of June, 1945.

EDWARD M. CONNELLY

United States Attorney

Attorney for the Appellee

The United States of
America

HARVEY ERICKSON

Asst. U. S. Attorney

[Endorsed]: Filed, June 18, 1945

[Title of Court and Cause.]

ORDER RESPECTING EXHIBITS

It being made to appear to the undersigned Judge
of the above-entitled Court that it is impossible to
reproduce certain exhibits in the above-entitled
cause, for the reason that the same are photographs
of which the negatives are not available,

Now, Therefore, the Clerk of the above-entitled
Court, in transmitting the record on appeal to the
Circuit Court of Appeals for the Ninth Circuit, is
hereby directed to transmit the original photo-
graphs, being Exhibits N, O & P.

Dated this 25th day of June, 1945.

L. B. SCHWELLENBACH

United States District Judge

Approved and notice waived:

EDWARD M. CONNELLY

United States District

Attorney and Attorney for
Plaintiff

[Endorsed]: Filed, June 25, 1945 [89]

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD

United States of America

Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify the foregoing type-written pages numbered from 1 to 89 inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and all other proceedings in the above entitled cause as are necessary to the hearing of the appeal therein, in the United State Circuit Court of Appeals as called for by the appellant in his Praecipe for Transcript of Record, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal from the judgment and decree of the District Court of the United States for the Eastern District of Wash-

ington, to the Circuit Court of Appeals for the Ninth Judicial Circuit, San Francisco, California.

I further certify that I hereto attach and herewith transmit the original Assignments of Error, Certified Bill of Exceptions, and Original Exhibits "N", "O" and "P".

I further certify that the cost of preparing and certifying the foregoing transcript is the sum of \$39.35, and that the said sum has been paid to me by Robertson & Smith, Attorneys for the Appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Spokane in said District this 26th day of June, A. D. 1945.

[Seal]

A. A. LaFRAMBOISE,

Clerk

By EVA M. HARDIN

Deputy [90]

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

Comes now the defendant and appellant, Richard Roland Haugen, by his attorneys, Robertson & Smith, and states that in the proceedings herein and in the order and judgment entered herein there are manifest errors, and he assigns the following errors committed by the above-entitled Court in the above-entitled cause, to-wit:

ASSIGNMENT OF ERROR NO. 1

The District Court erred in overruling defendant's plea of former jeopardy by reason of defendant's having been put upon trial for the same offense in case No. C-3929, entitled "United States of America, Plaintiff, vs. Richard Roland Haugen, Defendant", in the above-entitled Court, in which case the Court sustained an oral demurrer to the indictment after the opening statement in behalf of the plaintiff.

ASSIGNMENT OF ERROR NO. 2

The District Court erred in admitting over the objection of defendant hearsay evidence as to the contents of the contract between the United States of America and E. I. duPont deNemours & Company and the subcontract between the duPont Company and Olympic Commissary Company, the contract being the best evidence, as follows:

"Q. First I wish to ask you some general

questions. Who is the company that is doing the construction work at Hanford?

Mr. Sandvig: If he knows of his own personal knowledge.

Mr. Erickson: He is in charge of the construction.

A. Am I to answer if I know it of my own personal knowledge or officially?

Mr. Sandvig: Of your own personal knowledge.

Q. If you know it officially.

Mr. Sandvig: No; of his own personal knowledge.

A. The E. I. duPont deNemours Company.

Q. The E. I. duPont deNemours Company is building the project at Hanford?

A. They are the prime contractor.

Q. By prime contractor you mean they have the contract with the United States government?

Mr. Sandvig: I object as not the best evidence. If there is a contract between the duPont company and the United States, the contract itself is the best evidence.

The Court: I am inclined to agree with you, but I will let him answer and allow an exception, and I may later strike out the answer. I don't know yet.

(Question read by reporter.)

A. Yes.

Q. Now the contract which the E. I. duPont

deNemours Company has with the United States, is that a public contract, or otherwise?

Mr. Sandvig: May it be understood, Your Honor, without bothering the Court all the time, that I am objecting to all of this?

The Court: It is all subject to your objection, and an exception is allowed.

A. The contract is a secret contract.

Q. By whose orders is it a secret contract?

A. By the War Department.

Q. And you have——

The Court: Wouldn't that be a thing which——

Mr. Sandvig: I am taking it for granted my objection goes to all of this.

The Court: The Secretary of War would issue some sort of an order, would he not?

Mr. Sandvig: Yes, sure.

The Court: That it would be secret?

Mr. Erickson: I will establish that, I think.

The Court: All right.

Mr. Sandvig: The order itself would be the best evidence. That is like me saying what the statute is.

The Court: Go ahead, Mr. Erickson.

Q. Did the War Department, or who in the War Department issued that order?

Mr. Sandvig: If you know of your own personal knowledge.

A. The order came to my commanding officer from the office of the Chief of Engineers.

Mr. Sandvig: I make the same objection.

The Court: It is all being admitted subject to your objection.

Mr. Sandvig: I am afraid I will slip up on something.

The Court: You are not going to slip up on anything. You have your objection. It does seem to me, Mr. Erickson, that the order making it secret is something that could be produced.

Q. (Mr. Erickson): Is that something that can be produced?

A. I am not sure it was not a verbal order.

Q. Whom did you receive instructions from that the contract was secret?

A. I received verbal instructions from the office of the Chief of Engineers.

Q. And who in that office?

Mr. Sandvig: Subject to my objection.

Q. From whom in that office did you receive the instructions?

A. I received instructions that individual's name was not to be brought into a public hearing.

The Court: What justification could there be for concealing from the public an order which says that the contract is to be secret? He says he has orders to keep secret who gave the order."

ASSIGNMENT OF ERROR NO. 3

The District Court erred in permitting the plaintiff to introduce over objection oral secondary evidence as to the legal effect and contents of said contract, particularly between the duPont Company and Olympic Commissary Company, said subcontract being the best evidence, as follows:

“A. The E. I. du Pont de Nemours Company have a cost-plus fixed-fee contract with the government.

Q. Explain so we can understand——

Mr. Sandvig: The contract itself is the best evidence.

The Court: Yes; this all goes in over your objection.”

ASSIGNMENT OF ERROR NO. 4

The District Court erred in overruling defendant's objection to the introduction of further testimony after the written opinion of the Court filed December 22, 1944, stating, “The action must be dismissed”, as follows:

“Q. Will you state your name, please?

Mr. Sandvig: At this time, if the Court please, I want to object to the introduction of any evidence in this case—any further evidence in the case—on the ground and for the reason that the defendant has already been dismissed from the charge predicated against him, and that he has been in former jeopardy.

I just want to make this observation at this time. Your Honor wrote an opinion of the Court. It was signed by Your Honor. You went into the facts. You make your conclusions at considerable length. I do not know of any particular form of findings of fact and conclusions of law or decree or judgment that are required, but you go into it at great length.

The Court: I say at the end that the action must be dismissed.

Mr. Sandvig: Yes. And I say it is dismissed.

The Court: I will overrule the objection. There was no order of dismissal entered, as I construe it."

ASSIGNMENT OF ERROR NO. 5

The District Court erred in entering the order permitting reopening, filed February 13, 1945.

ASSIGNMENT OF ERROR NO. 6

The District Court erred in admitting in evidence additional hearsay testimony relating to the contract between the United States of America and the duPont Company after such reopening, as follows:

"Q. Now directing your attention to the original contract between the United States Government and the E. I. duPont de Nemours Company, what provision is made in that contract about property used in the prosecution of the work on the Hanford Engineer Works?

Mr. Sandvig: I object to that as not being the best evidence. The witness has the contract before him. They have opened the doors now, and the contract is no doubt admissible. He has been using it for evidence, and certainly the contract is the best evidence. No matter how good a lawyer he may be, we might disagree on its interpretation. The contract itself is the best evidence.

The Court: The objection is overruled."

ASSIGNMENT OF ERROR NO. 7

There was a total failure of proof and no substantial evidence to prove the intent of the defendant to defraud the United States of America or any agency thereof.

ASSIGNMENT OF ERROR NO. 8

The verdict of the Court and judgment of conviction is contrary to the law and the evidence.

And by reason of said errors and other manifest errors appearing in the record herein, the defendant and appellant, Richard Roland Haugen, respectfully prays that the judgment of conviction herein be set aside, and that the indictment be fully and in all respects dismissed as to him, and that he be fully discharged herein, or, in the alternative, that he be granted a new trial.

Dated this 18th day of June, 1945.

ROBERTSON & SMITH

By DEL CARY SMITH

Attorneys for Defendant-Appellant, Richard Roland Haugen

Service of the foregoing assignments of error by defendant, Haugen, is hereby accepted and the receipt of a copy thereof is hereby acknowledged this 18th day of June, 1945.

EDWARD M. CONNELLY

United States Attorney, Counsel for Plaintiff-Appellee, United States of America

HARVEY ERICKSON

Asst. U. S. Atty.

[Endorsed]: Filed June 18, 1945.

In the District Court of the United States for
the Eastern District of Washington, Southern
Division

C-3929

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RICHARD ROLAND HAUGEN,

Defendant.

REPORTER'S TRANSCRIPT OF TESTIMONY

Be It Remembered that the above entitled and numbered cause came on for trial before the Honorable L. B. Schwellenbach, judge of the above entitled court, at the hour of 10:00 o'clock a.m., June 14, 1944, at the Federal Court House, in Yakima, Washington, the plaintiff appearing by Mr. Edward M. Connelly, United States Attorney for said District, and Mr. R. Max Etter, Assistant United States Attorney for said District, the defendant appearing in person and by his attorney, Mr. Ole Sandvig;

Whereupon the following proceedings were had, to-wit:

The Court: Are the parties ready in the case of United States vs. Richard Roland Haugen?

Mr. Sandvig: The defendant is ready.

Mr. Etter: The government is ready.

Mr. Connelly: We have stipulated that this case may be tried to the Court, without a jury, and the

defendant has personally waived his right to trial by jury.

The Court: Are you going to make an opening statement?

Mr. Etter: May it please the Court, the defendant is charged [1*] by indictment on three counts. The difference in the counts is the second and third counts charge the uttering and publishing with intent to defraud the United States, and the first count is a charge of possession of a number of false and fraudulent meal tickets, with the intent to defraud.

The Government intends to show by its testimony that just prior to the time of the commission of the crime charged in the indictment, the defendant, Richard Roland Haugen, went to a printer in Tacoma, a man named George F. Allen, to get these tickets printed. Prior to the time he had gone over there he was an employee of the Hanford Project, and he himself had purchased from the Olympic Commissary Company a so-called meal ticket.

The Government will show the meal ticket which was then on sale there, which was purchased by the defendant before he went to Tacoma, was a composite ticket; that on one side or one end of the composite ticket was an authorization which was signed by the employee purchasing the ticket, which authorized the deduction from his pay, in the event the ticket was purchased in that fashion, or on the other hand where cash was paid that authorization was unnecessary.

* Page numbering appearing at foot of page of original Reporter's Transcript.

We will show that Mr. Haugen purchased one of these tickets. He took the so-called perforated end of the [2] ticket when he went to the printer, Mr. Allen, of Tacoma, and had Mr. Allen print 1,000 of these tickets, in the same form as the one he had in his possession. Then he sold these tickets, as charged in the indictment, to Mr. McDonald, in one instance, and to this other individual, Mr. Holloway, in the other instance.

He had on his person when apprehended several of these tickets, and he had in his place of residence at Yakima a further number of tickets, in the total amount of 966, I believe it was, all of which were of the same type as the one which he handed the printer for printing, and all of which contained the same serial number.

These tickets were not printed the same as the type they used, and we will prove the falsity and fraudulent character of the tickets themselves, that they were spurious.

We intend to show through the introduction of much of our proof in the form of exhibits which are certified exhibits of the War Department, a delegation of authority from Col. Mathias, who is the Area Engineer in charge of the Hanford Project, to Major Ebbs, the executive officer in charge of the corps of engineers. The further proof will be the authority of the Secretary of War to contract and expend money and to procure military supplies for carrying on the business of the War Department. [3] We intend to show the delegation of authority granted to the Secretary of War, from the Secretary

of War to the Undersecretary of War, and from the Undersecretary of War to the Commanding General of Army Service Forces. The fact of the delegation of authority will then be shown to proceed from the Commanding General of Army Service Forces to the chiefs of the various technical services, and the proof will show the Army Engineers is such a technical service.

We will show the designations of contracting officers by a designation or delegation of authority granting to certain officers the authority to approve contracts and to certify vouchers for payment of the same. That authority was in Major Ebbs by reason of delegation of authority down through the chain of authority originating with the Secretary of War, the immediate delegation of authority being from the Area Engineer, Col. Mathias, to Major Ebbs, in charge of the project.

We intend to further show the creation of the Manhattan Engineering District, having charge of the particular development and work on the Hanford Project.

The exhibits will also show the army orders which have designated the District Engineer, and the transfer order to the Area at Pasco.

We intend to show through the testimony of Major Ebbs, [4] the executive officer, what his particular duties are, and he will specify the jurisdiction and all matters on the project which come under his jurisdiction, by virtue of the delegation of authority contained in the proof I have just mentioned.

We will show the procedure of purchasing merchandise by which the regulations require the approval of the Area Engineer, or Major Ebbs, through the delegation of authority, of all purchases made on the Hanford Project. That approval is required on any purchase over the sum of \$2,000.00 before purchase, and the approval of purchases under \$2,000.00 is in the form of a confirmation or ratification; that those purchases of under \$2,000.00 may be purchased by the contractor under the contract, subject to ratification or confirmation by Major Ebbs.

We intend to show the connection and the interest of the Government in this particular case. We will present to the court the purchase order being used by the Olympic Commissary Company, upon which appear the conditions of the purchase order on the reverse side, and which are referred to on the front side of the purchase order, which by its terms vests all title in the United States of all merchandise purchases made by the Olympic Commissary Company, upon confirmation or ratification. We will show the procedure that is engaged in in the payment by the [5] United States for these purchases. We will show that the invoice of the Olympic Commissary Company, along with the purchase order, is presented to the DuPont Company, which makes payment on the amount and the items of purchase which have been made.

We will then show that the DuPont Company presents to the United States and to the Department over which Major Ebbs has jurisdiction, by his

delegation of authority, a total sheet in the form of a voucher, upon which appears the items and expenditures for which reimbursement is sought. There are different forms which are presented, which include the original order, the certificate of inspection, the voucher itself, and the copy, I believe, of the purchase order. This, we will show, is approved by Major Ebbs. His department is the sole department, and he is the sole officer who certifies these vouchers by virtue of his delegation of authority to the Army Finance Officer, who makes payment of these items from these funds which are appropriated by Congress, and which have been assigned for the purpose of the construction of the Hanford Engineer Project.

We will show further the system used in the so-called meal ticket plan. There are several types of meal tickets used. The only one which is material in this case is that plan which I have partly described in my opening statement, [6] having reference to the so-called section ticket which had a perforated side. Those are purchased in one of two ways, by deduction from pay-roll, which is a book transaction by du Pont, or it can be by outright purchase through the Olympic Commissary Company, by the individual purchasing the ticket.

We will show that money is credited immediately to the fund which is used in the expenditures for merchandise, equipment and wages on the Hanford Project, and that is credited to the fund maintained in a special account. In that account are funds of the United States and of no other person.

We will show through what we believe to be competent testimony that no money is furnished for any expenditure or any purchase or for any payroll by the du Pont Company on the Hanford Engineer Project, and that all funds used in the special account are funds of the United States expended by virtue of the purchase of merchandise on behalf of du Pont, but paid from special funds of the Government maintained for the credit of the du Pont Company.

The further proof will show through an employee of the Olympic Commissary Company, who will produce the other section of the ticket which was signed authorizing withdrawal of wages from the defendant Haugen, and will [7] show that that is kept and retained and has been retained in the records there on the project, and we will show that the other half of the ticket to which I have referred, the perforated part, was used by Haugen when he had the tickets printed in Tacoma.

We will show that these tickets were sold by the defendant to these two individuals named, Mr. Hollaway, in one instance, who received several tickets, and Mr. McDonald, and they will be brought here and will identify the tickets they purchased.

We will show furthermore, through the testimony of the supervisory checker of one of the messhalls the spurious ticket had come to and gone through the messhall, and this ticket was received by the lady, and later turned over to the du Pont Company and the Government.

The Government will show all equipment and all food in the Olympic Commissary Company is purchased by the Government funds and is the property of the Government.

We will show therefore the use of a spurious ticket is a fraud upon the Government, because of the fact there is no payment made to the Government, and it is a gratuity sought by the party passing this ticket for merchandise to which the Government has title, and for which the Government is not paid by the individual using the spurious ticket.

The Government will show the price at which these [8] tickets were sold. We will further show on the matter of notice to the defendant in respect to the ownership of the property, and with respect to the title to the Merchandise, that since and a long time prior to the time that these incidents occurred which resulted in the charge in this indictment, signs have been posted of various kinds and descriptions, some of which probably would not be material, as notice taken alone, but which in conjunction with the signs we claim would be sufficient notice of ownership of the property in the commissary building.

We will show by pictures the types of signs placed about the commissary, in which the statement is made that all food and equipment used in the building are the property of the Government, and any taking away of property would be prosecuted.

We will show further that these signs, in conjunction with that, appear at places all the way through the project, at the entrance within the project, and in conjunction with the mess halls,

which say "This is a Federal project, and the property thereon is the property of the Government," as a matter of notice to the defendant, and we will show at the time he purchased this meal ticket he knew the procedure involved, and knew how the meal tickets were purchased, from the fact of his own experience [9] at the project, and from these signs, and his intention was at the time to defraud the Government by the use of these tickets, and he actually perpetrated the fraud in the sale of these tickets to the individuals named.

I think that in general covers the proof the Government will use in substantiation of the charges in the indictment.

There was a statement made after arrignment by the defendant Haugen, in which he admitted the facts of the printing and sale of the tickets I have stated.

Mr. Sandvig: The defendant moves for an order of dismissal upon the opening statement of counsel for the Government, and for the further and additional reason that the indictment or any counts thereof do not state facts sufficient to constitute a crime.

Before I go into analyzing the indictment, counsel for the Government made what was to me a very significant statement. He said that the meal tickets allegedly held by the defendant were materially different, one had an edging and the other did not. We are charged with forging.

Is it wrong for me to go out and have tickets printed like these are as described in the indict-

ment? There is no allegation in the indictment, according to counsel's statement, that this is a true copy of the ones they used. It is different. It is materially different. They caught it, and counsel described it. [10]

The Court: How is it different? I have tried these fifty-cent and dollar counterfeitting cases, and they bring it in here and it looks impossible that anybody would take it. They are phoney on the face of them.

Mr. Sandvig: If they are so phoney—I have often thought of that; but we are not charged with counterfeitting.

The Court: Yes; it says you falsely made and counterfeitted.

Mr. Sandvig: Yes. I was mistaken about that. That is correct. But I don't know of any reason why I could not have these printed. There is no fraud in that. I can print all of them I want. I could have had a printer print a lot of them for me.

The Court: But they charge you with printing them with the intent of uttering them.

Mr. Sandvig: Yes. Take Count 1. "That Richard Roland Haugen heretofore, to-wit, on or about the 19th day of April, 1944, at Hanford in the county of Benton in the Southern Division of the Eastern District of Washington, and within the jurisdiction of this court, then and there being, did knowingly, wilfully, unlawfully and feloniously, knowing the same to be false, falsely made and counterfeitted, have in his possession with intent to utter and publish as true 966 false, fraudulent and

counterfeit meal tickets in words and figures as follows: 'Olympic Commissary Company, men's meal ticket, good only at Mess Hall No. 7, [11] \$12.60, plus tax.' Blank name, blank badge, blank date. 'All for the purpose of defrauding the United States.' "

I want to call attention to what he is charged with counterfeitting or fraudulently passing "Olympic Commissary Company, men's meal ticket," and so forth.

Now let us go to Count 2. "That Richard Roland Haugen heretofore, to-wit, on or about the 19th day of April, 1944, at Hanford, in the county of Benton, in the Southern Division of the Eastern District of Washington, and within the jurisdiction of this court, then and there being, did knowingly, wilfull, unlawfully and feloniously, knowing the same to be false, falsely made and counterfeitted, publish and utter as true to one J. L. Halloway, six false, fraudulent and counterfeit meal tickets in words and figures as follows: 'Olympic Commissary Company, men's meal ticket, good only at Mess Hall No. 7, \$12.60, plus tax' " and then blank name, blank badge and blank date "All for the purpose of defrauding the United States."

Under Sections 72 and 73 of Title 18, it is hard for me to determine which count that they prefer to have under Section 72 and which under 73.

The Court: Read those two sections right now, will you?

Mr. Sandvig: I will read 73 first. (reading same)

The Court: Have you read the opinion from the Ninth Circuit in the Johnson case? [12]

Mr. Sandvig: Yes. I will get to that. I haven't read it recently. I read it sometime ago.

They are charging us with forging and uttering and counterfeitting this for the purpose of receiving a sum of money to defraud the United States.

Is there anything about that that we can obtain any sum of money from the United States? It is not a claim on the United States; it is not an order upon the United States. By no stretch of the imagination can he obtain a cent of money from the United States. It cannot be under Section 73. They don't even allege that. They don't allege in the indictment these were counterfeitted or forged for the purpose of obtaining a sum of money from the United States.

I think I will read this, and then I will come to Section 72. It is true this is an early case—88th Federal Reports, at page 253, Staton vs. United States. I will not read too many cases to Your Honor, and for that reason I am going to read this one with some care. (Reading said case, followed by law argument.)

Now I will read Section 72. (Reading same.) We would have to have the contract between the Olympic Commissary Company and the du Pont Company here before us, and then in order to make the chain we must have the contract between du Pont and the Government. [13]

The Court: I think I understand your position. I don't want to shut you off.

Mr. Sandvig: Maybe I can answer them.

The Court: I will hear from you on the matter of this pleading, whether your indictment is sufficient.

Mr. Etter: The indictment, Your Honor, is drawn under the general rule, in the language of the statute; the first count being possession with intent to defraud, and the other two counts being the acts themselves.

I want to read a section from the Prussian case, in the 282d U.S. Reports, at page 675 (reading from said case).

The Court: His objection is can you allege the counterfeiting of a piece of paper or a meal ticket. Let us suppose the Commercial Hotel of Yakima issued meal tickets, and you allege the defendant counterfitted the meal tickets of the Commercial Hotel of Yakima for the purpose of defrauding the United States, would that be a sufficient indictment, without alleging the connection between the Commercial Hotel of Yakima and the United States?

Mr. Etter: That goes to the matter of proof rather than the sufficiency of the indictment. Counsel contends, as I understand, that the defendant himself must know as a matter of fact the relation that exists between some particular organization, such as the Olympic Commissary Com- [14] pany and the United States, where he has falsely made and counterfeitted these tickets, but he is charged with notice of that fact.

The substantial thing to me is this, that the defendant is charged with an attempt to defraud the Government by the use of these meal tickets. The question of proof of his knowledge of the fraud is one thing apart from the proof which the Government intends to offer to show the matter of his relationship to the Olympic Commissary Company. Our proof will show as far as the defendant is concerned that he should have known, or did know, by virtue of notice, the ownership and title, regardless of whether it was the Olympic Commissary Company or the Commercial Hotel. The proof will show——

The Court: I am not interested in your proof; it is a question of pleading. Is this a sufficient pleading to bring this defendant into court?

Suppose you charged him with counterfeiting a bus line ticket, or the ticket of the Yakima streetcar system, and you say it was with intent to defraud the United States. There is nothing in this Olympic Commissary Company meal ticket that shows it had any connection with the United States.

Mr. Etter: No, but the statute itself says "any writing." The Government charges that his purpose, regardless of what [15] company it was, or what particular act he may have performed, was for that purpose, and I think it is sufficient to charge him with doing this particular thing with intent to defraud the United States. Whether it was an Olympic Commissary Company meal ticket or some other writing, that his purpose was to defraud the United States. We charge that in the indictment, that he did this particular thing for

that particular purpose. I think we have to show the relation. That is a matter of proof.

The Court: But you are getting into the question of proof. Can you prove it. He has a right to have an indictment he can defend against, and can you charge him with doing something which apparently does not have any connection with the United States, and by simply adding on the words "for the purpose of defrauding the United States", put him on his defense? Are there not some cases on that question?

Mr. Etter: The Court mentioned the Johnson vs. Warden case.

The Court: That goes to the substance of the matter, the meaning of the words "other writing". Could you not charge anybody with doing anything in the world and then say "with intent to defraud the United States", and let him figure out how it was connected up with the United States?

If I cash a check at the Yakima Hotel and did not have any money in the bank, can you charge me with that [16] and then add the words "with intent to defraud the United States"?

Mr. Etter: This case of Johnson vs. Warden was a case where there was a forged physician's prescription. He forged the physician's prescription for narcotics, and they make this statement:

"We entertain no doubt that a forged physician's prescription for narcotics falls within the meaning of the phrase 'other writing' as used in that statute. It was said in *Prussian vs. United States*, 282 U.S., 675, that the words 'other writing' as used in a com-

panion statute, Section 29 of the Criminal Code, 18 U.S.C.A., Section 73, were included for the purpose of extending the penal provisions of the statute to all writings of every class if forged for the purpose of defrauding the United States."

The Court: That is not the question.

Mr. Etter: I think the indictment is sufficient.

Mr. Connelly: The indictment is in the language of the statute.

The Court: That is true, and the ordinary rule is if it is in the language of the statute it is sufficient, but here you have the extension of the statute into unlimited fields. If it was an obligation of the United States, a bond or anything like that, it would be all right, but it says "any other writing", and the Circuit Court of [17] Appeals says that that means any other writing. But when you extend the statute to the limits they have extended this statute, can you do it without some specific allegation?

Suppose you charge me with forging a check and passing it on the Yakima Hotel with intent to defraud the United States, how could I defend against that charge? How could I know what the relationship was between the Yakima Hotel and the United States Government?

Mr. Etter: You would not know the relationship, but the same thing might be true of forging a prescription. They would say "How did I know that had anything to do with the United States?" I think that argument was made in this writ for habeas corpus by Johnson.

The Court: I will read the Johnson case.

Mr. Etter: There are some other cases cited here, Prussian vs. United States.

The Court: I will take a few minutes recess.

(After a short recess the trial was resumed as follows:)

The Court: I am going to deny the motion and allow an exception, but I am denying it with this statement, that I intend to consider this question before I decide the case, and I consider it a serious question. There just isn't time right now. I haven't the facilities here to properly decide it. [18]

In the case of Meldrum vs. United States, 151 Federal 177, which is a case cited by the Ninth Circuit, a similar question was posed, and Judge Gilbert quoted from United States vs. Lawrence. This is Federal Case No. 15,572. This language is used:

“It is not necessary in an indictment for forgery to set out such a state of things existing in fact that the writing if genuine would necessarily or probably affect a right of the United States. When the writings appear, by their language, to be such that they might have the effect to defraud the United States, it is sufficient to set them out averring generally the intent to defraud the United States, but omitting all extrinsic circumstances.”

The language is used: “When the writings appear, by their language, to be such that they might have the effect to defraud the United States, it is sufficient to set them out, averring generally the intent to defraud the United States.”

The language here does not appear to be such that it might have the effect to defraud the United States. I have serious doubts about this question, but I will deny the motion and allow an exception. You may proceed with your testimony.

Mr. Etter: Your Honor, we request, if possible, that we be granted a short recess to confer on this matter. Your [18-a] Honor has some doubts in your mind about the further procedure in this matter. If the Court will grant us a few minutes recess.

The Court: Can we start at one o'clock?

Mr. Etter: Yes.

The Court: Is that all right, Mr. Sandvig?

Mr. Sandvig: Yes.

(Whereupon a recess was had to the hour of 1:00 o'clock p.m., of June 14, 1944, at which time, all parties being present as heretofore, the trial was resumed as follows:)

Mr. Connelly: If Your Honor please, in this case of United States vs. Haugen, it is true that we did give some consideration to the manner of the pleading. I know Mr. Etter waited for me one evening when we were trying the Fuel Dealers case, to discuss it with me.

As Your Honor knows, we are confronted with the difficulty that these contracts which would establish the relation between the Olympic Commissary Company and the Army, the prime contract and the secondary contract, are not available, for a very good reason. They are of a confidential character,

and having to do with a very important defense project.

During the noon hour I have read cases, one being United States vs. Tynan, in which similar language was used—that case is in the 6th Federal Second—with refer- [19] ence to forged doctors' prescriptions for intoxicating liquor. That case points out the very thought Your Honor pointed out in Judge Gilbert's decision.

I read the very recent case of Mullins vs. United States, in 51 Federal Supplement, where forged or counterfeit gasoline ration tickets were used, but again the distinction was pointed out that the gasoline coupons were thing required by law—the originals were—and the very fact that they were forged the court held the allegation that they were used in an attempt to defraud the United States was sufficient, because the original tickets were required by regulation and by law.

I am convinced in my own mind, if Your Honor please, that the oral demurrer to the indictment is very probably well taken. I believe Your Honor would be so convinced at the conclusion of any further study Your Honor would give it, and I am also convinced, particularly in view of additional evidence we have, setting up the system of paying the Olympic Commissary Company from Army funds, and the documentary proof we have in that respect, independently of contracts, we can sustain the charge, and we can prove the charge in that connection, and that we can safely plead in some manner that the Olympic Commissary Company is an

agency, with functions for the purpose of financing the men employed on this government project, and that is [20] paid by the Government in toto, for all of the meals and all of the food used, and all the expenses they are put to in feeding the men engaged on this project, and for that reason I would like to suggest that counsel have his client withdraw his plea, if he will, and let his verbal demurrer stand, and consent to it, and let an order be entered, and in that connection I would also like to move for a substantial reduction in this defendant's bond, to put it within his reach, so he would not have to remain in jail until another grand jury could return another indictment in different form.

Mr. Sandvig: I appreciate the difficulties counsel has, and in walking down the street awhile ago I told him I did not know how I could draw an indictment that would be good. I appreciate that difficulty.

Of course, my motion was made after the opening statement of counsel, and I moved for a dismissal both upon the opening statement of counsel, and upon the indictment. There might be a question. As a matter of fact, we have talked some here about former jeopardy I am inclined to think we would plead former jeopardy after the opening statement of counsel. That is not free from doubt. I frankly state that.

If the Court rules that it might be submitted again to the grand jury, here is the situation. I have never [21] known my client until I got in this case. From what I understand he was born here in the

state of Washington over on the Coast. He has lived here all his life. He lived in Bellingham for some time and in Auburn. He put in three years at the Bellingham Normal School, and these high wages came up and he went to work at Hanford. I talked with him in the presence of Mr. Connelly. I think Mr. Connelly will agree there is no use in the defendant getting away on this thing. He will not run away, and of course the only purpose of a bond is to assure his appearance. I think the Court would be justified in letting him out on his own recognizance. If he could get in touch with his folks—the trouble is this. They are a wonderful family, as I believe. They haven't a great deal of money, but my client will not even let his folks know he is in this difficulty. He will not write to them, or anything else. He writes to them, but not through the county jail. He will not tell them he is in trouble. So I think it would be former jeopardy.

Mr. Connelly: If the indictment is invalid, I cannot agree with you.

The Court: On this point I want to make it clear that I am not granting any motion to dismiss on the basis of the opening statement. The opening statement is not a matter I am considering at all. It is purely the indictment. [22]

Mr. Connelly: That is what I understood. That is all I would be consenting to on behalf of the Government.

Mr. Sandvig: I think this case should be a state case.

Mr. Connelly: Maybe it will be, but I haven't any intention of discussing that now.

Mr. Etter: I think it should be treated——

Mr. Sandvig: The Court indicated he is predicated on my motion——

The Court: I am considering the demurrer to the indictment, and only that.

Mr. Etter: I think the record should show the defendant entered a plea of not guilty without presenting a demurrer.

Mr. Connelly: There is no written demurrer served or filed.

The Court: I cannot pass upon the question of former jeopardy at this time.

Mr. Sandvig: No. That cannot be passed on now.

Mr. Connelly: It is on the question of the sufficiency of the indictment.

The Court: Let the record show that the defendant, through his counsel, orally demurred to the indictment, on the grounds that it did not state facts sufficient to constitute a crime, and that the demurrer has been sustained.

Mr. Sandvig: Then he should go out. He should be free until you get a new indictment.

Mr. Connelly: We will file another complaint in the Commissioner's Court in a few minutes. I haven't one ready. [23]

Mr. Sandvig: Then let him go on his own recognizance.

The Court: How much is the bail?

Mr. Connelly: It is \$1,500.00.

The Court: Tell the Commissioner \$500.00 will be sufficient and I will withhold signing any judgment of dismissal until after you have had an opportunity to file a complaint.

Mr. Sandvig: Can't you cut it down lower? I think he should go on his own recognizance.

The Court: No, no. There is nothing that has been said so far that is in any way indicative to me the defendant, your client, should go out without putting up a bond.

Mr. Sandvig: Five hundred dollars.

The Court: Tell the Commissioner it will be \$500.00, and I will take a recess until such time as you are ready to present something further.

Mr. Sandvig: I reserve the right to raise the question of former jeopardy.

The Court: Yes; you can raise that question at the proper time. [24]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF TESTIMONY

Be It Remembered that the above entitled and numbered cause came on regularly for trial before the Honorable L. B. Schwellenbach, Judge of the above entitled court, at the hour of 1:25 o'clock p.m., October 5, 1944, at the Federal Court House, in Yakima, Washington; the plaintiff appearing by Mr. Harvey Erickson, an Assistant United States Attorney for said district, and the defend-

ant appearing in person and by his attorney, Mr. Ole Sandvig;

Whereupon the following proceedings were had and testimony given, to-wit:

The Court: The defendant has filed a written waiver of a jury. Is the Government willing to waive the jury?

Mr. Erickson: Yes; the Government will waive the jury.

(Mr. Erickson having made an opening statement of the plaintiff's evidence, Mr. Sandvig moved for dismissal on said opening statement, which motion was denied by the Court.) [25]

GEORGE F. ALLEN,

called as a witness by the Plaintiff, first duly sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. Will you state your name, please?

A. George F. Allen.

Q. Where do you reside?

A. Tacoma, Washington.

Q. What is your business?

A. I am in the printing business.

Q. How long have you been in the printing business? A. Since 1920.

Q. Do you know the defendant in this case?

A. No, I don't.

Q. Have you ever seen him before?

A. At my place of business.

(Testimony of George F. Allen.)

Q. When did he come to your place of business?

A. About the middle of April, about April 15th.

Q. What year? A. This year.

The Court: Where is your place of business?

A. At 1138 Pacific Avenue.

Q. (Mr. Erickson): I hand you plaintiff's identification "A", and ask you to state what that is, Mr. Allen.

A. That is a sample of the job that Mr. Haugen gave us to re-print. [26]

Q. What did Mr. Haugen say when he gave you that sample?

A. I am not quoting verbatim, you understand, but he came in the shop and asked if we could reproduce a job of that nature, and I looked at it and said I could.

Q. Is that the card that Mr. Haugen gave you?

A. Yes, sir.

Q. Is that your writing on the card?

A. Yes, sir; that is my own handwriting on the corner, put on by myself at the time.

Q. Is that card in the same condition now that it was when you received it, with reasonable wear and tear? A. It looks very much the same.

Mr. Erickson: I offer it in evidence.

Mr. Sandvig: It is subject to my general objection.

The Court: It may be admitted.

(Card admitted in evidence as Plaintiff's Exhibit "A".)

[Printer's Note: Plaintiff's Exhibit "A" set out in full at page 186.]

(Testimony of George F. Allen.)

Q. What conversation did you have with Mr. Haugen about printing these tickets at that time?

A. It was Saturday morning, and he asked if we could produce that job by Monday, I think at ten o'clock, and I demurred at first, and we talked it over, and I said "I will have to work this afternoon to do it", which I did, and I gave him the price on the original job, and he said "If you can rush it through, it is worth \$5.00 of my time for you to [27] do it", and I did rush the job through, and delivered it to him on the promised time, and he paid the \$5.00.

Q. I hand you plaintiff's identification "B", and ask you to state what those are?

A. Those are the cards we printed.

Q. Are they in the same condition now that they were when you printed them?

A. Yes, sir.

Mr. Erickson: I will offer them in evidence later.

Q. What was the price of this job you quoted Mr. Haugen?

A. Ten dollars was the original price, and he offered a \$5.00 premium for rushing the job through.

Q. State whether or not it was rushed through?

A. Yes, sir; it was.

Q. When did you complete the job?

A. Monday morning.

The Court: How many did you print?

A. One thousand.

(Testimony of George F. Allen.)

Q. (Mr. Erickson): And what did Mr. Haugen pay you for the job?

A. Fifteen dollars.

Q. What representations did he make to you about his authority to have them printed, if any?

Mr. Sandvig: I object to that as being irrelevant and immaterial.

The Court: I do not think it is material now.

Q. State whether or not you delivered those tickets to Mr. Haugen?

A. He came to the shop and picked them up there.

Mr. Erickson: You may examine.

Mr. Sandvig: No questions.

(Witness excused.)

RITA MAPES,

called as a witness by the Plaintiff, first duly sworn,
testified as follows:

Direct Examination

By Mr. Erickson:

Q. Will you state your name, please?

A. Rita Mapes.

Q. Where do you live? A. At Hanford.

Q. When did you move to Hanford, or go there for the purpose of accepting employment?

A. A year ago last April.

Q. Directing your attention to April, 1944, what was your employment at that time?

(Testimony of Rita Mapes.)

A. I was assistant cashier, supervising cashier.

Q. What were your duties?

A. I had to train cashiers to take cash and supervise the checkers.

Mr. Sandvig: That was for the Olympic Commissary Company? [29]

A. Yes, sir.

Q. (Mr. Erickson): You were working for the Olympic Commissary Company at that time?

A. Yes, sir.

Q. What were your duties with reference to meal tickets, if any?

A. The cashiers were to issue the meal tickets to the men and I was to see that they were issued correctly.

Q. Did you have anything to do with their purchasing the meal tickets?

A. I did if we were short of checkers; then I would fill in.

Q. Did you at any time make any examination or observation for spurious or counterfeit tickets?

A. I was there when they first issued the meal tickets, and we were given instructions about them, and I was very well acquainted with them.

Q. I hand you plaintiff's identification "C", and I will ask you to state if you know anything about that identification, Miss Mapes?

A. This meal ticket, with several others, came through the door one evening, and we had been——

Mr. Sandvig: State what you did in regard to it.

The Court: What is it that you are identifying?

(Testimony of Rita Mapes.)

A. This is a meal ticket I turned in to the office that the man gave me. [30]

Q. (Mr. Erickson): Why did you turn that ticket into the office?

Mr. Sandvig: Objected to as being incompetent, irrelevant and immaterial, and calling for a conclusion, why she turned them in.

The Court: The objection is overruled, and an exception allowed.

A. We had been told that a man was going to issue false meal tickets.

Mr. Sandvig: Please.

Mr. Erickson: Are you objecting?

Mr. Sandvig: I object to what she was told.

The Court: I will overrule the objection. It is not hearsay; it is an oral act. She may answer. Go ahead.

A. I noticed this meal ticket, and the meal tickets should be with consecutive numbers, and I noticed some with the same numbers during the course of the evening, about five came in, and also on the side of the meal ticket there is a perforation on one end, and I saw they were all made out to the same name, and I notified the office.

Q. What did you do with that identification?

A. I turned it in to the office. This is the same meal ticket I collected.

Mr. Erickson: I offer it in evidence at this time.

Mr. Sandvig: The usual objection.

(Testimony of Rita Mapes.)

The Court: I will withhold the ruling. It is in no [31] way tied in with the defendant yet.

Q. Going back to the numbers on these tickets, you say that the regular bona fide Olympic Commissary Company meal tickets were numbered how?

A. Numerically.

Q. And you say that you observed several tickets, and what numbers did they have?

A. Ending with the same figure, the same numbers.

The Court: You mean under your system there were no two that would have the same number?

A. That is right.

The Court: And you had several of them with the same number? A. Yes, sir.

Q. (Mr. Erickson) How many did you have bearing the same number?

A. There were three that came in through the mess hall, and I did not see more than that.

Q. You turned this in to whom?

A. To Frank Hales. He was the assistant chief cashier.

Mr. Erickson: I believe that is all.

Mr. Sandvig: That is all.

(Witness excused) [32]

DOROTHY ALLQUIST

called as a witness by the Plaintiff, first duly sworn,
testified as follows:

Direct Examination

By Mr. Erickson:

Q. Your name now is Dorothy Allquist?

A. Yes, sir.

Q. And it was formerly Dorothy Denman?

A. Yes, sir.

Q. During April, 1944, where were you employed?
A. At Hanford.

Q. What was your business?

A. I was a cashier checker.

Q. For whom were you working?

A. Mr. Cron was the chief.

Q. For what company or concern were you working?

A. The Olympic Commissary Company.

Mr. Sandvig: You were working for the Olympic Commissary Company and not for the United States?

The Court: You had better wait until your turn comes.

Mr. Sandvig: Yes, I get a little previous.

Q. What was the nature of your duties there at the time?

A. At that time I was checking the meal tickets as they came through the door, punching the tickets.

Q. As the men came in to purchase meals you would punch the tickets? [33]

(Testimony of Dorothy Allquist.)

A. That is right.

Q. And how were the tickets of the Olympic Commissary Company numbered?

A. In consecutive order.

Q. These tickets were secured how by the men?

A. They were purchased at the cashier's office at the mess hall, or at the board room where they were taken on weekly wages.

Q. What did a meal ticket cost?

A. If my memory is correct they cost around \$12.75 per ticket.

Q. And the ticket was punched every day according to the value of the food these men ate?

A. That is right.

Q. And it was your job to punch out the amount of the meal on the meal ticket?

A. That is right.

Q. In April, 1944, did you notice any peculiarity in certain meal tickets?

A. We were told to watch for a certain type of ticket, and I was on the lookout for it.

Q. What type of ticket were you to watch for?

A. A ticket that did not have one edge perforated, as ours did, and also on a smoother paper, and the lines were too fine, and the name was over a straight line rather than a dotted line, and also the serial number was the same. [34]

Q. State whether or not you discovered any of those? A. I did.

Q. Do you recall what the serial number was?

A. It was 321350.

(Testimony of Dorothy Allquist.)

Q. How many of those tickets did you discover?

A. I had one myself. That is all I saw.

Mr. Erickson: That is all.

Mr. Sandvig: That is all.

(Witness excused)

LEROY J. HOLLAWAY

called as a witness by the Plaintiff, first duly sworn,
testified as follows:

Direct Examination

By Mr. Erickson:

Q. Will you state your name, please?

A. Leroy J. Hollaway.

Q. Where do you live?

A. At 1929 South Fairview Avenue, Yakima.

Q. Where are you employed?

A. I was working for Redman & Fairchild at Yakima.

Q. In April, 1944, where were you employed?

A. At Hanford.

Q. What were your duties at Hanford?

A. Truck driver.

Q. State whether or not you purchased any meal tickets at Hanford? [35] A. Yes, sir.

Q. How long had you worked there prior to April, 1944?

A. I went there the 2d of February.

(Testimony of Leroy J. Hollaway.)

Q. And during that time you procured several meal tickets from the Olympic Commissary Company?

A. Two or three, I think.

Q. You had gone and procured food on those and they had been punched in the regular manner?

A. Yes, sir.

Q. What did you pay for those tickets?

A. I paid \$12.95.

Q. Directing your attention to the defendant in this case, Richard Roland Haugen, do you know him?

A. Yes, sir.

Q. How long have you known him?

A. Well, I don't know. He came to work after I did.

Q. What name did you call him by?

A. Hogan was the only name I knew.

Q. H-o-g-a-n?

A. I think so.

Mr. Sandvig: It was not H-a-u-g-e-n?

A. Maybe it was. I didn't know how to pronounce it.

Q. (Mr. Erickson) I hand you plaintiff's identification "D", and ask you to state what that is.

A. That is the ticket I purchased from Mr. Hogan. [36]

Q. Is that the only one you purchased from Mr. Haugen?

A. That is the only one I bought from him, yes, sir.

Q. How much did you pay for that ticket?

A. Five dollars.

Q. What conversation did you have with Mr. Haugen when you purchased the ticket from him?

(Testimony of Leroy J. Hollaway.)

Mr. Sandvig: I object as incompetent, irrelevant and immaterial, and especially unless it was in the presence of the defendant.

Mr. Erickson: He was talking with Mr. Haugen.

Mr. Sandvig: Yes. All right.

A. He asked if I wanted to buy a meal ticket, and mine was almost gone, and I said yes, I would buy one from him, but I didn't know what kind it was——

Mr. Sandvig: Just answer the question.

The Court: The question is, what did Mr. Haugen say to you.

A. He asked if I wanted to buy a meal ticket, and I told him yes, I would take one.

Q. (Mr. Erickson) There was nothing else said? A. No.

Q. How much did you pay him?

A. Five dollars.

Q. What did you do with the ticket after you procured it?

A. I ate one meal on it, and turned it in to Mr. Piper. [37]

Q. You turned it in to whom?

A. I gave it to Mr. Piper.

Q. You ate one meal at the mess hall of the Olympic Commissary Company on that ticket?

A. Yes, sir.

Mr. Erickson: I offer it in evidence.

The Court: You allege that Mr. Hollaway bought six of them, and he says he bought only one.

(Testimony of Leroy J. Hollaway.)

Mr. Erickson: I will have to go into that a little further.

Mr. Sandvig: Right along that line there is one thing I want to be certain about, and that is this. I am letting this go through with a lot of things going in, but I don't want them to be able to amend the indictment to conform with the proof. In other words, they have charged us with certain acts. Are you going to stay by it or are you going to change it?

Mr. Erickson: We will put in competent legal proof that the law requires.

Mr. Sandvig: I object to anything outside of the things that are charged in the indictment, and it may be understood that goes clear through my objection?

The Court: I understand that. They charge he sold six tickets to Mr. Hollaway, and he says he bought only one.

Mr. Erickson: I would like to ask one or two more questions. [38]

The Court: Go ahead.

Q. Mr. Hollaway, did you personally receive any meal tickets without purchasing them from Mr. Haugen? A. Yes, sir.

Q. How many did you receive without purchasing them from him?

Mr. Sandvig: Just one minute. If what he is trying to introduce now would be a fact then Hollaway is an accessory to the crime.

The Court: That might be.

(Testimony of Leroy J. Hollaway.)

Mr. Sandvig: If that be true, then his testimony is not admissible at this time until they establish some other evidence.

The Court: No; I would have to take that into consideration, if he was an accessory, in passing upon the testimony of Mr. Hollaway.

Mr. Sandvig: He would be an accessory.

The Court: Go ahead, Mr. Erickson.

Q. How many other tickets did you receive without purchasing them from Mr. Haugen?

A. I think it was five or six; I am not sure. I don't recall, but it was five or six. I don't know whether it was five counting the one I paid him for, or six with that.

Q. Have you those tickets now?

A. No, sir.

Q. Do you know where they are? [39]

A. I have a pretty good idea where they are at.

Mr. Erickson: I offer this one in evidence.

The Court: It may be admitted. Exception allowed.

(Meal ticket admitted in evidence as Plaintiff's exhibit "D".)

[Printer's Note: Plaintiff's Exhibit "D" set out in full at page 188.]

The Court: Do you mean you got six for the price of one, or what do you mean by that?

A. He told me—he asked if I wanted to sell them, and he said he would sell them to me for \$5.00, and I could make a little on them if I wanted

(Testimony of Leroy J. Hollaway.)

to, and I didn't think there was anything wrong with the tickets, and I took the other tickets.

Examination by the Court:

Q. You knew the tickets cost \$12.75?

A. Yes, sir.

Q. And that there was no way he could get ahold of them and sell them to you for \$5.00?

A. I didn't think at the time.

Q. How much were you going to pay for them, \$5.00 apiece? A. Yes, sir.

Q. How much were you going to sell them for?

A. I sold them for \$6.00.

Q. How many did you sell?

A. I don't know whether it was four or five of them. Five, I think. [40]

Q. (Mr. Erickson) Do you know to whom you sold those? A. Yes, sir.

Q. (Mr. Erickson) Can you give us those names?

A. I couldn't give you the names now, because I don't remember their names. I just knew them by what the boys called them out there.

Q. (The Court resuming) Did you pay him the \$5.00 after you sold them? A. No, sir.

Q. You just made a clear profit of \$6.00 apiece?

A. I gave each fellow his money back. I didn't make nothing. When I found out what they were, I gave the boys their money back, and got the tickets.

Q. You did not pay him anything?

A. No, sir. Just for the one I got.

(Testimony of Leroy J. Hollaway.)

Mr. Erickson: That is all.

Mr. Sandvig: I think the Court covered my cross examination. That is all.

(Witness excused)

RANDELL P. McDONALD

called as a witness by the Plaintiff, first duly sworn,
testified as follows:

Direct Examination

By Mr. Erickson:

Q. Will you state your name? [41]

A. Randell P. McDonald.

Q. Where do you live?

A. At 1906 South Fairview Avenue.

Q. In the city of Yakima? A. Yes, sir.

Q. In April, 1944, and prior thereto, where were you employed?

A. By E. I. du Pont, at Hanford.

Q. In such capacity how long had you worked there prior to April, 1944?

A. I started the second day of February.

Q. And had you during that time consumed food and bought meal tickets from the Olympic Commissary Company? A. I bought two.

Q. And you used those two?

A. I used one of them and almost the other one by that time.

Q. And they had been purchased in the regular way when you got the meals? A. Yes, sir.

(Testimony of Randall P. McDonald.)

Q. Do you know the defendant in this case, Richard Roland Haugen?

A. I met him on the job. He worked at the same place I did.

Q. Did you have any conversation with Mr. Haugen about meal tickets? A. No.

Q. Did you purchase any meal tickets? [42]

A. I purchased one.

The Court: From Mr. Haugen?

A. Yes, sir.

Q. (Mr. Erickson): I hand you plaintiff's identification "E," and ask you to state what that is?

A. That is a meal ticket I bought from Haugen.

Mr. Erickson: I offer that in evidence at this time.

Mr. Sandvig: May I ask one question? Did you use that ticket?

A. I ate one meal off it.

Mr. Sandvig: How much was that meal?

A. Sixty cents.

Mr. Sandvig: And they took the ticket from you later?

A. No, sir; I turned it over to Mr. Piper.

Mr. Sandvig: Then you are the one that was defrauded, and not the United States, is that correct?

The Court: That is something I will have to decide. You do not need to answer that.

Mr. Sandvig: That is all.

The Court: The exhibit may be admitted.

(Testimony of Randall P. McDonald.)

(McDonald meal ticket admitted in evidence as plaintiff's exhibit "E".)

[Printer's Note: Plaintiff's Exhibit "E" set out in full at page 188.]

Q. (Mr. Erickson): How much did you pay Mr. Haugen for that meal ticket?

A. I paid him \$5.00. [43]

Q. What conversation did you have with Mr. Haugen when you purchased it?

A. He asked if I needed a meal ticket and I said yes, and he sold me one for \$5.00.

Mr. Erickson: That is all.

(Witness excused.)

JOHN CRON,

called as a witness by the Plaintiff, first duly sworn,
testified as follows:

Direct Examination

By Mr. Erickson:

Q. Will you state your name, please?

A. John Cron.

Q. What is your business?

A. Chief Cashier of the Olympic Commissary Company.

Q. How long have you been such chief cashier?

A. I assumed the duties the 28th of January, 1944.

Q. What are your duties as chief cashier?

(Testimony of John Cron.)

A. Over-all supervision of the cashiers and checkers on the job.

Q. Will you explain briefly how meal tickets are issued by the Olympic Commissary Company?

A. We have two plans, the cash sales, which is just a cash transaction between the cashiers in the mess halls and the customers. The sale price was \$12.98, including the Wash- [44] ington state tax. The other plan was a payroll deduction plan, whereby the employee signed the deduction stub, which is attached to the ticket. The stub is removed from the ticket and the ticket given the purchaser, and the stub forwarded to the du Pont payroll department, and they make the payroll deduction there.

The Court: Do you pay a state tax on this?

A. Yes, sir.

The Court: If this were a Government transaction, Mr. Erickson, there could not be such a tax, it would not be subject to the tax.

Mr. Erickson: The state tax was paid by the man who purchased the ticket, but there was no tax paid on the purchase of the food. It was merely a sale of food.

Witness: It was the sales tax of 3%.

Mr. Sandvig: If it is a government project the United States does not have to pay a sales tax.

Witness: The United States is not purchasing the ticket. The individuals are purchasing the tickets.

Mr. Sandvig: Just answer the questions that are

(Testimony of John Cron.)

asked. This is the proper time to object. We will get into it now. The United States never has to pay a state sales tax.

Mr. Erickson: That is a disputed question. That question is up with the State Tax Commission right now.

The Court: The Supreme Court has held the United [45] States does not have to pay any tax to the state. I think it is an element to be considered. It is admitted there was a sales tax charge?

Mr. Erickson: Yes; that is admitted. But we do not concede that a sales tax was rightly charged, and the State Tax Commission is considering now whether or not that tax shall be charged.

The Court: I do not think it is decisive, but it is a factor to be taken into consideration in determining whether this is a Government transaction or otherwise.

Q. (Mr. Erickson): I hand you plaintiff's exhibit "A," and ask you to state what it is.

A. This particular ticket is good. This is a genuine ticket issued by the Olympic Commissary Company. This is one of our tickets.

Q. What about the stub that goes with the ticket?

A. If the ticket is for cash the stub is destroyed, because it has no value. If the ticket is bought on the payroll deduction plan the stub attachment is removed and forwarded to the du Pont payroll department, and the deduction is made from the employee's wages.

(Testimony of John Cron.)

Q. State how the stubs are numbered.

A. The stub carries the same number the ticket does. They are all serially numbered.

Q. Have you the stub? [46]

A. Yes, sir (indicating). That goes with this. The two are attached in that fashion (indicating), and the purchaser signs his name here, and this is given the customer, and this is forwarded to the du Pont payroll department.

Q. Handing you plaintiff's exhibit for identification "A-1" and the plaintiff's exhibit "A", what is the connection between those two?

A. Apparently these were at one time attached, and the records indicate this ticket, 321,350, was sold to Richard Roland Haugen on March 14, and the receipt of this payroll deduction stub here has been acknowledged by the du Pont payroll department on March 19, and apparently the payroll deduction made on the payroll check for that week ending. This is the authorization by the employee, authorizing du Pont to take it from his salary.

Mr. Sandvig: What is the full name of the company?

A. The E. I. du Pont de Nemours Company.

Mr. Erickson: I offer plaintiffs identification "A-1" in evidence.

The Court: It may be admitted.

Mr. Sandvig: I would like to ask a couple of questions.

The Court: All right.

(Testimony of John Cron.)

Cross Examination

By Mr. Sandvig: [47]

Q. This is Exhibit "E", and you have in your hand Exhibit "A". What is the difference between those?

A. The two would normally join, which would show a perforation mark, and there is none here. The line and the signature——

Q. I am referring now to exhibit "E". Is that the perforation? A. No.

Q. All right. Does exhibit "A" show a perforation mark? A. Yes, sir.

Q. Where?

A. On the edge there. It is obvious.

Q. Isn't that considerably different than that one? They are the same size?

A. Yes, sir. The material difference appears here. There are three lines, name, number and date. There is a dotted line and this is solid, and the word "Tax" appears——

Q. Let me get that.

A. This line, name, badge number, and date. Those are all dotted lines and these are solid lines. That is the difference.

Q. You say they are dotted lines.

A. The words "Richard Haugen," that is a broken line.

Q. Is this a broken line? A. Yes, sir. [48]

Q. "Richard Haugen?" A. Yes.

Q. Where is it broken?

(Testimony of John Cron.)

A. The line on which "Richard Haugen" is written.

Q. Where is it broken?

A. See the dots (indicating).

Q. You might have something there. I will let the Judge look at it. I can't see it. I don't think it is material. Go ahead.

The Court: Do you object to "A-1"?

Mr. Sandvig: Oh, let it go in.

The Court: It is admitted, and an exception allowed.

(Meal ticket stub admitted in evidence as plaintiff's exhibit "A-1".)

[Printer's Note: Plaintiff's Exhibit "A-1" set out in full at page 186.]

Direct Examination—(Resumed)

By Mr. Erickson:

Q. I hand you exhibit "B". Will you pick out one or two cards at random, and I will ask you to state whether or not those meal tickets are genuine or spurious.

A. This (indicating) is counterfeit.

Mr. Sandvig: I object to that as being a conclusion of the witness. That is the very question the Court has to decide. I doubt if we will have any substantial——

The Court: The objection is sustained. You may ask him if in his opinion the tickets are of the same type [49] and printed in the same way as those which have been testified to. If he says "No", he

(Testimony of John Cron.)

can point out the difference between those and the plaintiff's exhibit "A".

Q. Examine a card out of that bunch at random, and state what the differences are between one of those and the plaintiff's exhibit "A".

A. There are differences, two of which I have outlined already. The lack of perforation along the edge of the ticket, the difference between the broken or dotted lines for the name, badge number and date. The dotted line appears on the tickets issued by the Olympic Commissary Company, and these have the solid lines. The third difference we consider outstanding is the word "Tax" is capitalized here, and it is a small "T" on these tickets here, and there is an obvious difference in type, but I don't know so much about that. It looks different. What the different classes of type are, I do not know. There is a difference in the intensity of the red in the No. 7 on the card, denoting the mess hall at which the ticket is to be used, and they all carry the same number, which of course is not done under our system. That is for the control of the tickets.

Q. I hand you plaintiff's exhibits "C", "D" and "E", and ask you to point out the differences on those.

A. All three of these exhibits you have just handed me most [50] recently here have all those identifying marks I was talking about, the capital "T", the solid lines, the straight edge here, which shows a lack of perforation. In other words, this top edge would be attached to this stub, and when

(Testimony of John Cron.)

it is torn off there is a jagged edge along there. These are in good condition, and would show the perforation if it had been there.

Q. In your opinion, Mr. Cron, are exhibits "C", "D" and "E" genuine tickets of the Olympic Commissary Company? A. No, sir.

Mr. Sandvig: That calls for a conclusion.

The Court: I will sustain the objection.

Q. Are you familiar with the cost of food that is used in preparing these meals?

A. Well, if I understand——

Mr. Sandvig: Yes or no.

A. If I understand correctly you mean the cost to the Olympic Commissary Company——

Mr. Sandvig: Answer yes or no.

Mr. Erickson: He does not understand the question.

The Court: You do not understand the question?

A. That is right.

Q. I mean are you familiar with the cost of the food to the Olympic Commissary Company?

A. Yes, sir. [51]

Q. Will you explain that?

Mr. Sandvig: I object to that. You can't introduce such evidence until the corpus delicti has been proved.

The Court: That might be if we had a jury here.

Mr. Sandvig: I appreciate the fact Your Honor is trying this case without a jury.

The Court: Let it go in, and ultimately I will decide whether it should be stricken.

(Testimony of John Cron.)

Mr. Erickson: I will withdraw this witness and put on another witness.

The Court: Any cross examination?

Mr. Sandvig: No cross examination.

(Witness excused.)

C. E. PIPER,

called as a witness by the Plaintiff, first duly sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. Your name is C. E. Piper?

A. Yes, sir.

Q. What is your business?

A. I am a special agent of the FBI.

Q. And as such are you familiar with the investigation of the case of Richard Roland Haugen?

A. I am. [52]

Q. What investigation did you make in this case?

A. On the night of April 30th, Lieutenant Howe of the Hanford patrol, and Lieutenant H. I. McCallahan of the military intelligence, came to me with tickets which they alleged were counterfeit tickets, and they had traced several of these tickets to L. J. Hollaway, and asked me to accompany them to Mr. Hollaway's home to determine whether he was the individual who was circulating these tickets

(Testimony of C. E. Piper.)

at Hanford. I went with them to Hollaway's home that night. Mr. Hollaway told me——

Mr. Sandvig: Well, now.

The Court: The objection is sustained.

Q. You can tell what you did, and eliminate any conversation that was not in the presence of the defendant Haugen.

A. I took from Hollaway a meal ticket which he had——

Mr. Sandvig: I object to that, unless it is connected with the defendant.

The Court: I will overrule the objection, and an exception is allowed.

A. The ticket which Hollaway had in his possession. The next connection I had with the case was on the following morning, on May 1st, when I first saw the defendant, Richard Haugen.

Q. Where did you see him?

A. At the Armory at Yakima. He had reported at that time for [53] a preinduction physical examination to the local draft board. At that time I questioned Mr. Haugen concerning the tickets which had been alleged to be counterfeit tickets. At that time Mr. Haugen readily admitted to me that the tickets which I showed him were counterfeit tickets.

Q. What tickets did you show him?

A. I showed him a ticket which Mr. Hollaway had given me. I also showed him several other tickets which Lieutenant Howe had in his possession. At that time Richard Haugen took these four tickets from his wallet (indicating) and gave

(Testimony of C. E. Piper.)

them to me, and indicated at that time definitely that they were counterfeit tickets.

Mr. Erickson: I offer them in evidence.

Mr. Sandvig: The usual objection.

The Court: The objection is overruled, and an exception allowed.

(Meal tickets admitted in evidence as plaintiff's exhibit "F".)

[Printer's Note: Plaintiff's Exhibit "F" set out in full at page 189.]

Q. What transpired next?

A. During the conversation that followed Mr. Haugen told me that he had a cigar box at his hotel room, at the Commercial Hotel, containing approximately 980 more of these counterfeit tickets, and he told me definitely if I wanted those I could get them by going to his room for them.

Q. Did you do so? [54] A. Yes, sir.

The Court: I thought you said this afternoon this was after the arraignment.

Mr. Erickson: The statements took place after the arraignment. I am coming to that. This is before the arrest.

Mr. Sandvig: I think that is right; this was before he was arrested.

Witness: There was no arrest at all.

The Court: You are getting pretty close to the McNab case when you search his room. Go ahead.

Q. I hand you plaintiff's identification "B", and ask you to state what that is.

(Testimony of C. E. Piper.)

A. This is the box of meal tickets which I found in Room 312 of the Commercial Hotel, which was occupied on May 1st by the defendant, Richard Haugen. It contained 961 counterfeit tickets.

Mr. Erickson: I offer them in evidence at this time.

Mr. Sandvig: Let me ask a few questions.

Mr. Erickson: Yes.

Voir Dire Examination

By Mr. Sandvig:

Q. You said this contains 966 counterfeit tickets?

A. I said 961.

Q. How do you identify it? [55]

A. I took all of these tickets at the time I removed them from the room, and they have been in my possession ever since.

Q. Ever since? Didn't we have them in our possession here for a little while?

A. They have been in your possession only since they were here.

Q. You did not take one out or stick one in?

A. No, sir.

Q. In other words, I am getting mad at you FBI men for going too strong. Do you know whether this particular ticket (indicating) was in there at the time you got it, or not, or did I stick it in there?

A. That I do not know, sir.

Q. You said so in the first place.

A. I only testified there were 961 in the box at the time.

(Testimony of C. E. Piper.)

Q. And I handed you this one and you said this one was in there.

Mr. Erickson: I object to that, Your Honor.

Mr. Sandvig: It doesn't make any difference, but I don't like to have people make statements like that. That is all.

The Court: Plaintiff's exhibit "B" may be admitted.

(Box of meal tickets admitted in evidence as plaintiff's exhibit "B'.) [56]

[Printer's Note: Plaintiff's Exhibit "B" set out in full at page 187.]

Direct Examination Resumed

By Mr. Erickson:

Q. Did you place Mr. Haugen under arrest?

A. Mr. Haugen was placed under arrest on May 1st.

Q. 1944? A. 1944.

Mr. Sandvig: You got these new tickets before you put him under arrest? A. Yes, sir.

Q. (Mr. Erickson): Was he arraigned before the United States Commissioner?

A. He was arraigned on three different occasions. He was brought before the Commissioner, I believe, on May 3d, and again on May 6th. That will be a matter of record. I am not sure of the first date, but the May 6th date I am certain.

Q. Did you take a statement from Mr. Haugen?

A. Yes, sir.

Q. When did you take the statement?

(Testimony of C. E. Piper.)

A. I took the statement from Mr. Haugen after the last hearing before the Commissioner on May 6th.

Q. The last hearing? A. Yes, sir.

Q. And you have the statement?

A. Yes, I do (handing paper to Mr. Erickson).

Q. I hand you plaintiff's identification "G", and ask you to state what that is.

A. This is the signed statement given to me by the defendant, Richard Haugen.

Mr. Erickson: I offer it in evidence at this time.

Mr. Sandvig: Oh, if Your Honor please, that is the same objection we had this morning. It was taken after he was placed in custody.

The Court: But after he was arraigned. It may be admitted. An exception is allowed.

(Statement of defendant to FBI admitted in evidence as plaintiff's exhibit "G".)

[Printer's Note: Plaintiff's Exhibit "G" set out in full at page 190.]

Mr. Erickson: Shall I read it?

The Court: No; I can read it faster. Have you seen it, Mr. Sandvig?

Mr. Sandvig: No.

The Court: We will take a few minutes recess while you examine it.

(After a short recess the trial was resumed as follows, to-wit:)

Mr. Erickson: I haven't finished with the direct

(Testimony of C. E. Piper.)

examination, but I understand Mr. Sandvig wants to question about the statement.

Mr. Sandvig: No; let's go on.

Q. (Mr. Erickson): I hand you plaintiff's identification "H", [58] and ask you to state what that is?

A. It is a photograph of a sign which appears on the Hanford Reservation, a picture of the sign.

Mr. Sandvig: If you will offer them all in evidence, my objection will be the same to all of them. Offer that one.

Mr. Erickson: I offer "H" in evidence. What are your objections?

Mr. Sandvig: The witness says this one appears on the Hanford Reservation. That is what I am afraid of, Judge, that we will get this case where we are trying to make a case out of nothing. In other words, who put it there? Maybe I put it up there. Who had the authority to put it up?

The Court: Let me see the rest of the pictures.

(Pictures handed to the Court)

Mr. Sandvig: They are all in the same category.

Mr. Erickson: They purport to show the general character of the property there inside the mess halls.

Mr. Sandvig: If I put them up there and I did not have any authority, they should have arrested me. That is the danger in this case.

The Court: I will sustain the objection to "M", "L", "K", "J" and "H", and admit "N", "O" and "P", and allow an exception. [59]

(Testimony of C. E. Piper.)

(Photographs admitted in evidence as plaintiff's exhibits "N", "O" and "P".)

Mr. Erickson: I believe that is all.

Cross Examination

By Mr. Sandvig:

Q. Referring to the exhibit the Judge has there, you wrote that? A. Yes, sir.

Q. And he signed it? A. Yes, sir.

Q. And he thought it was all right. I notice the words "good faith", did you explain to him what good faith meant? A. I presume I did.

Mr. Sandvig: That is all.

The Court: All right. Exhibit "G" is admitted.

(Witness excused)

MAJOR R. F. EBBS

called as a witness by the Plaintiff, first duly sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. Will you state your name, please?

A. Major R. F. Ebbs.

Q. What are your duties at the present time, Major Ebbs?

A. Executive Officer of the Hanford Engineer Works. [60]

Q. How long have you held that position?

(Testimony of Major R. F. Ebbs.)

A. Approximately 19 months.

Q. You reside on the project at Hanford?

A. At Richland, Washington.

Q. I will hand you plaintiff's identification "Q" and ask you what that is, Major?

A. This is a regulation pertaining to delegations of authority from the Commanding General of the Army Service Forces to the Chief of Technical Services.

Q. First I wish to ask you some general questions. Who is the company that is doing the construction work at Hanford?

Mr. Sandvig: If he knows of his own personal knowledge.

Mr. Erickson: He is in charge of the construction.

A. Am I to answer if I know it of my own personal knowledge or officially?

Mr. Sandvig: Of your own personal knowledge.

Q. If you know it officially.

Mr. Sandvig: No; of his own personal knowledge.

A. The E. I. du Pont de Nemours Company.

Q. The E. I. du Pont de Nemours Company is building the project at Hanford?

A. They are the prime contractor.

Q. By prime contractor you mean they have the contract with the United States government? [61]

Mr. Sandvig: I object as not the best evidence. If there is a contract between the du Pont company

(Testimony of Major R. F. Ebbs.)

and the United States, the contract itself is the best evidence.

The Court: I am inclined to agree with you, but I will let him answer and allow an exception, and I may later strike out the answer. I don't know yet.

(Question read by reporter.)

A. Yes.

Q. Now the contract which the E. I. du Pont de Nemours Company has with the United States, is that a public contract, or otherwise?

Mr. Sandvig: May it be understood, Your Honor, without bothering the Court all the time, that I am objecting to all of this?

The Court: It is all subject to your objection, and an exception is allowed.

A. The contract is a secret contract.

Q. By whose orders is it a secret contract?

A. By the War Department.

Q. And you have——

The Court: Wouldn't that be a thing which——

Mr. Sandvig: I am taking it for granted my objection goes to all of this.

The Court: The Secretary of War would issue some sort of an order, would he not? [62]

Mr. Sandvig: Yes, sure.

The Court: That it would be secret?

Mr. Erickson: I will establish that, I think.

The Court: All right.

(Testimony of Major R. F. Ebbs.)

Mr. Sandvig: The order itself would be the best evidence. That is like me saying what the statute is.

The Court: Go ahead, Mr. Erickson.

Q. Did the War Department, or who in the War Department issued that order?

Mr. Sandvig: If you know of your own personal knowledge.

A. The order came to my commanding officer from the office of the Chief of Engineers.

Mr. Sandvig: I make the same objection.

The Court: It is all being admitted subject to your objection.

Mr. Sandvig: I am afraid I will slip up on something.

The Court: You are not going to slip up on anything. You have your objection. It does seem to me, Mr. Erickson, that the order making it secret is something that could be produced.

Q. (Mr. Erickson): Is that something that can be produced?

A. I am not sure it was not a verbal order.

Q. Whom did you receive instructions from that the contract was secret? [63]

A. I received verbal instructions from the office of the Chief of Engineers.

Q. And who in that office?

Mr. Sandvig: Subject to my objection.

Q. From whom in that office did you receive the instructions?

A. I received instructions that individual's name was not to be brought into a public hearing.

(Testimony of Major R. F. Ebbs.)

The Court: What justification could there be for concealing from the public an order which says that the contract is to be secret? He says he has orders to keep secret who gave the order.

Q. Can you answer that question, Major? I am not familiar enough with it.

A. I cannot answer the question. I would be glad to answer the question for the judge in chambers.

The Court: You cannot do that in a criminal case.

Q. If I understand you clearly——

The Court: Nobody is criticising you. You are just following orders, and that is all right.

Q. You will not make the name of the officer public who said this contract should be secret?

A. That is correct.

Mr. Sandvig: Is there some order he should not?

The Court: Go ahead. [64]

Q. What is the relationship of the Olympic Commissary Company to the E. I. du Pont de Nemours Company? A. Subcontractor.

Q. State whether or not the contract between the E. I. du Pont de Nemours Company and the Olympic Commissary Company is a secret contract?

Mr. Sandvig: I want to make the specific objection to that, to keep the record straight. Obviously the contracts themselves would be the best evidence, unless they can show some very urgent reason why it should not be produced.

(Testimony of Major R. F. Ebbs.)

The Court: I am inclined to think you are right, but I will let the Government prove what it can, and I will decide those questions later. Go ahead. The question is is this a secret or a public contract between the Olympic Commissary Company and du Pont.

A. It is a restricted contract.

Q. What is meant by a restricted contract?

A. In the War Department they have four classes of classified documents, supersecret, secret, confidential and restricted.

Q. Is the information available in this trial of the contract between the Olympic Commissary Company and the du Pont company?

A. By order—— [65]

Mr. Sandvig: May it be understood I object to all of this?

The Court: Yes; we all understand that.

Mr. Sandvig: I don't want any question about it later.

The Court: You have said that several times.

Mr. Sandvig: I don't want to butt in every question.

The Court: You have said that too, and yet you keep butting in. Go ahead.

A. By order it is not to be made available.

Q. By order from whom?

A. From the office of the Chief of Engineers.

Q. Do you have those orders?

A. No, I do not.

(Testimony of Major R. F. Ebbs.)

Q. That the contract between the Olympic Commissary Company and the du Pont company should not be made public?

A. I have received those orders.

Q. Who gave you those orders?

A. My commanding officer.

Q. Who is your commanding officer?

A. Col. F. T. Mathias.

The Court: Do you have any reason to believe that Col. Mathias would have any more freedom than you have?

A. He would not have any more freedom, sir.

Q. What is the reason for the contract between the Government and the du Pont Company and the Olympic Commissary [66] Company being secret, if you know?

A. It is considered that the contracts cover a very important construction and operation job, and it would be detrimental to the country to reveal their contents.

Mr. Sandvig: That is hearsay.

A. Those are my orders.

Q. Are you familiar with the way the job is being operated, that is, the way the E. I. du Pont de Nemours Company is proceeding with the contract work there, whether it is a cost-plus contract or a cost-plus fixed-fee, or how the operation is done?

A. I am familiar with that.

Q. Will you explain that?

(Testimony of Major R. F. Ebbs.)

A. The E. I. du Pont de Nemours Company have a cost-plus fixed-fee contract with the Government.

Q. Explain so we can understand——

Mr. Sandvig: The contract itself is the best evidence.

The Court: Yes; this all goes in over your objection.

Mr. Sandvig: I can't resist, it seems so obvious.

Q. Will you explain how the work is being financed, the job there, the construction work?

A. The Government originally made advances to the E. I. du Pont de Nemours Company pursuant to the terms of the contract, from which they procured labor and material for the construction of the Hanford Engineer Works. This ad- [67] vance was used as a revolving fund and other advances have been made, and when that comes to a certain level additional advances are made, or in certain instances payment is made for the procurement of labor and material that is accepted by the prime contractor.

The Court: Mr. Erickson, the exact language the Major uses will be very important. I find it difficult to take it down. Will the Government supply me with a copy of the Major's testimony?

Mr. Erickson: Yes; I would be glad to supply it, and Mr. Ridenour can start immediately on transcribing it.

The Court: All right; thank you. I cannot take all of his language down.

(Testimony of Major R. F. Ebbs.)

Mr. Erickson: No.

Q. So that in the building that is going on there the money you say for the material and labor is supplied by the Government?

Mr. Sandvig: Well——

A. That is right.

Mr. Sandvig: This is going in over my objection. I can't resist putting in the objection.

The Court: Sometimes you can't resist every time you get a chance. Go ahead.

Mr. Sandvig: I know, but he can't testify to that.

Q. And what compensation does the E. I. du Pont Company get [68] for the building that is being developed there? A. A fixed fee.

Q. Is there any objection to disclosing what that fixed fee is, Major? A. One dollar.

Q. So that the building that is being developed there is being paid for, as I understand your testimony, the expense of it and one dollar?

A. Building and operations when the plant goes into production. The fixed fee is one dollar.

Q. The Government is paying all the expense—will you enumerate the expense the Government is paying on the job, as nearly as you can, the general category? A. The general category?

Q. Yes.

A. Everything that comes on to that project is by virtue of the contract and procurement instrument, either by the prime contractor or its sub-

(Testimony of Major R. F. Ebbs.)

cost-fixed-fee contractor and paid for by the Government, and title vested therein.

Q. What is the relationship of the Olympic Commissary Company to the E. I. du Pont de Nemours Company?

A. The Olympic Commissary Company is a subcontractor.

Q. By that you mean what? Explain the term "subcontractor".

Mr. Sandvig The general objection.

A. Generally a subcontractor is one who contracts to do a [69] portion of a job which has previously been contracted, as I understand it.

Q. Now the Olympic Commissary Company in this case, if I understand you correctly, is employed to do a portion of the work which the du Pont Company has agreed to do?

A. That is correct.

Q. And among the things the Olympic Commissary Company has agreed to do is the furnishing of meals and the procurement of food, is that right?

A. That is correct.

Q. Will you explain, Major, the arrangement or the set-up on the commissary for the mess halls? How do they operate?

A. The mess hall is a Government owned building with Government owned equipment, including ranges, tables, in which the Olympic—

Mr. Sandvig: I hate to do it Judge, but I am scared that maybe I haven't put in this, that the

(Testimony of Major R. F. Ebbs.)

questions now are calling for a conclusion of the witness.

Mr. Erickson: I understand that you are objecting to everything.

Mr. Sandvig: He is testifying to the legal effect of an arrangement.

The Court: He is testifying now to the ownership of the equipment. I know because I put the title through myself that the real estate belongs to the Government, and [70] the buildings constructed thereon must necessarily belong to the Government. He is now testifying to the ownership of the equipment in the mess halls.

Mr. Sandvig: I don't want to butt in, but I want to be sure I have everything covered. I will let your Honor decide it later on.

The Court: All right. It will go in subject to your objection, and I will pass on the questions later. Go ahead, Major.

A. The Olympic Commissary Company prepares food in these Government-owned and equipped mess halls to serve the project workers generally. They procure the food and are reimbursed by the Government through du Pont for that food procurement.

Q. Explain just how they are reimbursed.

A. They present invoices received from various food vendors to the prime contractor, supported with Government approval, for the purchase of such food, supported by an Olympic Commissary Company purchase order and receiving reports

(Testimony of Major R. F. Ebbs.)

which are witnessed on an average basis by Government inspectors, and the Olympic Commissary Company issues a check therefor. In turn—I misstated myself. I meant the du Pont Company issues the Olympic Commissary Company a check for it. And they present that to the Government for further reimbursement. [71]

The Court: The Olympic Commissary Company pays for it in the first place?

A. That is correct, sir.

The Court: And they get the money from du Pont and du Pont gets the money from the Government?

A. That is correct, sir. Except that the money is given to the du Pont Company in advance.

The Court: Out of this revolving fund?

A. Yes, sir.

The Court: If I were a baker at Pasco and baked bread and shipped it up there, I would get an Olympic Commissary Company check for it, make out an invoice and get a check for it?

A. Yes, sir.

The Court: And that would have to be approved by a Government inspector?

A. The procurement is approved prior to the services being rendered. That is, it is authorized.

The Court: Under the authorization the Olympic Commissary Company would buy fifty dozen loaves of bread from me per week?

A. Yes, sir.

(Testimony of Major R. F. Ebbs.)

The Court: They determine how much bread is needed in that mess hall, and I am a baker at Pasco, and they authorize the Commissary company to order fifty dozen [72] loaves of bread a week, the Commissary company orders it and I submit my invoice to the Commissary company, and they pay me? A. That is correct.

The Court: And they get the money from du Pont and the money in turn comes out of the Government's revolving fund?

A. That is correct, sir.

The Court: And the same is true of any item of food that is purchased?

A. I would like to modify that to this extent, that procurements of less than \$2,000.00 need not be approved by the Government in advance. They are ratified or confirmed afterwards.

The Court: Is that \$2,000.00 a period?

A. No, sir; that is one purchase.

The Court: For any one purchase?

A. Yes, sir. And we audit very carefully on split purchases to bring it below that amount.

The Court: All right, Mr. Erickson.

Q. (Mr. Erickson resuming): That applies to all food that is procured by the Olympic Commissary Company?

A. For the Hanford Project, yes, sir.

Q. On that job? A. That is correct. [73]

Q. Now, how about the labor, the payment of the labor in the preparation of that food?

A. The labor is paid—the labor is employed by

(Testimony of Major R. F. Ebbs.)

the Olympic Commissary Company. The payment is made by the Olympic Commissary Company to the employee or laborer. The voucher is presented to the du Pont company for reimbursement which in turn is reimbursed by the Government.

Q. The same as for the food? A. Yes, sir.

The Court: Do you know about this? Do you have a payroll voucher per week or for a two-week period? A. A weekly period.

The Court: Is that approved by the Government in any way?

Mr. Sandvig: Subject to my objection.

The Court: This is all subject to your objection.

A. We have prime checkers, and they check the actual workers during that period, and then we make a payroll audit, and a reconciliation of the bank account is a portion of our payroll audit.

Q. (Mr. Erickson resuming): The prepared food after it is set on the table is the property of whom?

Mr. Sandvig: Oh, —

The Court: That purely is a conclusion.

Mr. Erickson: I want to state why I believe I can ask that. [74]

The Court: All right.

Mr. Erickson: This man is the Major in charge of that department, and an officer of the Government, and I think he is entitled in his official capacity to testify to the title to the particular product they have there for sale. That he has qualified himself sufficiently and is sufficiently familiar with

(Testimony of Major R. F. Ebbs.)

the procedure in the purchasing of the food and the labor, so that he is qualified and competent to testify who owns the food there as it sits on the table.

Mr. Sandvig: As a matter of fact, if Your Honor please, I might get to the crux of the matter at this time, in view of his question, if I may examine this witness.

The Court: I will sustain the objection to that question. That is purely a legal conclusion. I let you ask him, for example, what a subcontractor is, and the Supreme Court of this state has said what a subcontractor is, and the witness happened to agree with the Supreme Court of the State of Washington, and I accepted it, but suppose he had given the definition of a subcontractor which was really a materialman, I would have to take the legal definition of a subcontractor. Do I not have to decide who is the owner of this property from the facts the best you can give them to me? [75]

Mr. Erickson: The officer in charge of an air depot or a flying field is competent to testify to the ownership of property that is stolen.

The Court: That is a little different. You are asking the Major how this food is paid for, and then it becomes a question for me to decide who is the owner of it. Mr. La Framboise can testify the Government owns the land out there, because he wrote the checks to pay for it. That is a simple proposition, but when you have a complicated legal question as to who owns the food after it is pre-

(Testimony of Major R. F. Ebbs.)

pared and on the table, I do not think he is entitled to answer, but I will let him answer the question, on the same theory I have permitted the rest of the testimony.

A. We have required the cost-plus-fixed-fee subcontractors to include in their procurement instruments a condition that title vests in the Government upon delivery to the site, or, if I am not mistaken, at the manufacturer's place of business, under certain conditions.

Q. My question was as to the prepared food.

A. Under the circumstances I would say the food is prior to its being prepared and after it is prepared the property of the Government.

Q. Have you a sample purchase order with you?

A. Yes, sir (handing paper to counsel).

Q. I will hand you plaintiff's identification "R", Major, [76] and ask you to state what that is.

A. This is a purchase order used by the Olympic Commissary Company for all of their procurements in connection with their cost-plus-fixed-fee subcontract for the Hanford Engineer Works.

Q. If I understand correctly, all supply purchases are purchased on blanks of this nature?

A. That is correct.

Mr. Erickson: Have you any objection to its being received in evidence?

Mr. Sandvig: The only way I can proceed is to object to everything, unless the Court insists I make it specific.

(Testimony of Major R. F. Ebbs.)

The Court: It will go in, subject to your general objection.

(Purchase Order admitted in evidence as plaintiff's exhibit "R".)

[Printer's Note: Plaintiff's Exhibit "R" set out in full at page 257.]

Mr. Sandvig: My general specific objection, because I don't want to keep objecting. Otherwise I would be objecting to every question.

The Court: I think you are doing that. That is all right. It may be admitted.

Q. State whether or not you are familiar with the sale of these meal tickets.

A. Well, generally, yes. As to the minute details probably not. [77]

Mr. Erickson: I can call another witness who can better testify to that.

Mr. Sandvig: Let me ask some questions.

Cross Examination

By Mr. Sandvig:

Q. Now, Major, I am going to be point-blank on this. I don't mean it as an insult. I know you are trying to do the right thing about this thing. I appreciate that. You said that the du Pont company, I think it is the E. I. du Pont de Nemours Company, or something, but I will call it the du Pont company, have a contract with the United States of America?

A. Yes, sir.

Q. And you say it is a cost-plus contract?

A. I said it was a cost-plus-fixed-fee contract.

(Testimony of Major R. F. Ebbs.)

Q. What is the date of that contract; do you recall? A. No, I do not.

Q. Who signed it; do you recall?

A. That is classified information.

Q. It certainly can't be a mystery about who signed it.

Mr. Erickson: He said it was.

A. I would like to explain to the Court.

The Court: If there is any question you cannot answer say you cannot answer it, because you are under orders not to answer.

Q. You have seen the contract? [78]

A. Yes, sir; I have.

Q. And you know what they are building out there and everything, do you?

A. Yes, sir; I do.

Q. And you have seen all the terms and conditions of it?

A. I have read the contract several times.

Q. Where is the contract, the original contract, or did you read the original?

Mr. Erickson: I object as immaterial.

Q. Did you read the original contract?

A. No; I did not.

Q. Do you know where the original contract is?

A. Yes, sir; I do.

Q. But you have never seen the original contract?

A. I never read the original contract. I have seen it.

(Testimony of Major R. F. Ebbs.)

Q. The original contract?

A. That is right.

Q. You have seen it? A. Yes, sir.

Q. Where did you see it?

Mr. Erickson: I don't know that that is material.

A. The original contract was processed by the general accounting office.

Q. Processed. What do you mean by processed by the accounting office? [79]

A. I mean it went through a series of channels to finally terminate in the general accounting department.

Q. They sent the original contract to all of these offices?

A. They sent the original contract to those who have been cleared to receive that classified information.

Q. You know I understand your position. I don't want to get any secrets, but I do want to know—how many pages are there to that contract?

A. I couldn't say.

Q. You can't give the number of pages even?

Mr. Erickson: I object as immaterial.

The Court: I will sustain the objection.

Mr. Sandvig: If Your Honor please, my idea is this. I have not seen the contract.

The Court: No, I guess you haven't.

Mr. Sandvig: I am very dubious about this. To put it in other words, supposing it is a contract of 100 pages or 500 pages. I am going into his ability

(Testimony of Major R. F. Ebbs.)

to interpret that contract, and to give us the legal conclusion which he is attempting to give.

The Court: You are testing the accuracy of his statement.

Mr. Sandvig: Yes.

The Court: I do not see that the number of pages has anything to do with that. [80]

Mr. Sandvig: I read this indictment several times and there is still a legal question in my mind about that indictment.

The Court: He said he read the contract several times.

Q. You read the contract several times, the original contract, is that right?

A. I have never read the original contract.

Q. You have never read the original contract. I don't imagine Germany or Japan would care who signed the contract.

The Court: He said he cannot tell you, and that is the end to that.

Q. All right. Now then that was a cost-plus contract?

A. It was a cost-plus-fixed-fee contract.

Q. All right. Was there any provision in that contract in regard to this situation? Suppose I went down there with a whole gang of men tomorrow, or a whole army, and started to haul off everything that the du Pont company owned down there, and they permitted me to do it, who would have to pay the cost, the Government or the du Pont company, under the terms of that contract?

(Testimony of Major R. F. Ebbs.)

Mr. Erickson: Oh, I object to that question.

The Court: I will overrule the objection. He may answer the question.

A. The Government.

Q. The Government would pay it anyway. Is there any pro- [81] vision in that contract—I don't want you to disclose any secrets—but is there any provision in that contract where the du Pont company has to do anything—use any reasonable precaution?

A. There is a termination clause in the contract if they don't use reasonable precaution.

Q. This termination contract then, that they have to use some precaution, what are the terms of that, what precaution are they supposed to use?

A. The termination clause you refer to, is that what you refer to?

Q. Yes. What precaution are they supposed to use, to keep me from carrying off the place, are they supposed to use any precaution?

A. I would say they are obligated to use the ordinary diligence of any normal business concern.

Q. You say that. Do you remember the phraseology of the contract in respect to that?

A. It is an option of the contracting officer as to when he may exercise the termination clause.

Q. What are the conditions under which the officer may exercise that termination clause?

A. I do not believe I would be permitted to answer that question.

(Testimony of Major R. F. Ebbs.)

Q. That is what I am getting at, is simply this, and I am [82] not insulting about it. It was a voluminous contract, was it not?

Mr. Erickson: That would not make any difference, and I am objecting to it as being immaterial.

A. I did not refuse to answer the other question on the basis I didn't know. I said I could not reveal that information. I did not say I do not have that information.

The Court: If he had said he simply looked at the contract once, I would have permitted you to ask him if he looked at it one minute, ten minutes, or two hours.

Mr. Sandvig: He said he never saw the original.

The Court: He has seen the original and has read a copy of it several times. I do not think it makes any difference how voluminous it is.

Q. Where did you see the copy?

A. I have jurisdiction over one copy.

Q. How do you know it is a copy?

A. It is authenticated.

Q. By whom?

A. By competent authority.

Q. But by whom?

A. Well, I have to say I cannot reveal the identity of certain persons.

Q. Do you suppose that Germany or Japan care who signed it?

The Court: That has nothing to do with deciding this [83] question.

Mr. Sandvig: It is just unfortunate that the

(Testimony of Major R. F. Ebbs.)

Government can't introduce it in evidence, but I don't want my client convicted just because——

The Court: There is no use arguing with the witness about that.

Mr. Sandvig: I guess it is a religion with the Major, but I have no argument with the Major.

Q. All right. This contract between the Olympic Commissary Company and du Pont, have you seen that? A. Yes, sir.

Q. Where is that?

A. I have jurisdiction over a copy of that.

Q. And that in substance provides just for the feeding of these people?

A. Will you restate the question?

Q. That is just for feeding the workmen down there, is that what it provides in respect to?

A. It provides for the operation of the barracks and for the feeding of the people there, and certain canteen sales.

Q. What is there secret about that?

The Court: He says he has received orders it is to be a restricted contract.

Q. From whom did you receive such orders, that it was a restricted contract? [84]

A. I testified I cannot reveal the identity of the persons. It came from the office of the Chief of Engineers.

Q. It came from the office of the Chief of Engineers; and by whom was it signed?

The Court: He has testified he cannot reveal that.

(Testimony of Major R. F. Ebbs.)

A. I can testify who signed the Olympic Commissary Company contract.

The Court: All right.

A. The contract with the Olympic Commissary Company was approved by my commanding officer.

Q. Who is your commanding officer?

A. Lt. Col. F. T. Mathias.

Q. How long have you known him?

A. Approximately 21 months.

Q. Did you ever see his commission?

A. No, I have not.

Q. If I came down there and represented myself as a Major General would you take my word for it, too?

A. I would like to answer that with a question.

Q. You would not know but from the commission. Would you take my word for it, and follow my orders?

A. I have evidence he is a lieutenant colonel.

Q. What evidence have you got?

A. Mr. Erickson is about to present that.

Mr. Sandvig: All right. I want to find out. [85]

Mr. Erickson: I will offer it in evidence. I will let the Major describe it.

The Court: Tell us what it is.

A. This (indicating) contains an extract from the orders and written up and published by the Chief Engineer's office, delegating authority to division and district engineers to act as contracting officers, and also the authority from the District Engineer to Lt. Col. Mathias to act as contracting

(Testimony of Major R. F. Ebbs.)

officer and carry out certain other functions, including the right of certain redelegation of authority.

Q. The first page, this is a delegation of ministerial and contractual authority of Area Engineer, and signed by J. C. Marshall, Corps District Engineer. Do you know Mr. Marshall?

A. Yes, sir; I know him.

Q. Do you know his signature?

A. Yes, sir.

Q. How often have you seen him sign?

A. This is under the War Department seal by the Secretary of War.

Q. I am asking a question.

A. I have known him for 21 months, approximately.

Q. When did the Colonel get the order?

A. Right there.

The Court: It is an authenticated copy, and the [86] statute provides an authenticated copy is admissible in evidence.

Mr. Sandvig: I do not like to disagree with Your Honor, but it is not authenticated.

The Court: He said it is. It is certified by the Secretary of War through his assistant Chief Clerk, Mr. Cook. It is an authenticated copy. It may be admitted.

(Extract of Orders admitted in evidence as plaintiff's exhibit "S".)

[Printer's Note: Plaintiff's Exhibit "S" set out in full at page 260.]

(Testimony of Major R. F. Ebbs.)

Q. You do not pretend to know the exact terms and conditions of this contract between the Olympic Commissary Company and the du Pont company, do you? A. I do not pretend to?

Q. Yes.

A. No; there is no pretense there.

Q. You do not pretend to know the exact terms and conditions of the contract. The Olympic Commissary Company has no contract with the United States direct? They are subcontractors under du Pont? A. That is right.

Q. They have no contract with the United States. They just account to du Pont?

A. Yes; that is right.

Mr. Erickson: This is the regulation (indicating).

The Court: Is that authenticated, too? [87]

A. Yes, sir.

The Court: It may be admitted.

(Regulation admitted in evidence as plaintiff's exhibit "Q".)

[Printer's Note: Plaintiff's Exhibit "Q" set out in full at page 192.]

Q. You know what they do more or less in practice in regard to these things, but you are not sure that is in accordance with the contract?

A. What contract?

Q. Oh, any of these contracts.

A. It is my business to know what they do pretty much.

(Testimony of Major R. F. Ebbs.)

Q. You are not a lawyer?

A. No, I am not.

Q. Have you consulted a lawyer as to the interpretation of this contract?

A. I have a very competent legal staff.

Q. And do they have access to this contract, too?

A. Indeed.

Q. The original or just a copy of it?

A. Which contract?

Q. The du Pont-United States contract.

A. I have testified that the original is filed with the General Accounting Department.

Mr. Sandvig: I think that is all. I may want to recall him. [88]

Redirect Examination

By Mr. Erickson:

Q. There is one matter I neglected to ask about, and that is in regard to state taxes. I will ask you about the payment of business and occupational tax on the purchases by the Olympic Commissary Company.

A. The business and occupational tax of the Olympic Commissary Company?

Q. Yes.

A. That is not paid to the State of Washington.

Q. What taxes are paid to the State of Washington by the Olympic Commissary Company, if any?

A. The only tax that I know of which is turned over to the State of Washington is that which is

(Testimony of Major R. F. Ebbs.)

collected from civilians eating at the Olympic Commissary operated mess halls, and that tax is that which is applicable to the civilian cost of the meal, and not that which is applicable to the Government cost of the meal. By that I mean the meal is subsidized.

Q. Will you explain what you mean by that part of the meal that is subsidized?

A. There is a standard charge for meals on these meal tickets that we have seen tonight. They run 62c including tax. The individually purchased meals are sold at 67c. All meals—I mean by that breakfast, luncheon or dinner—are the same price, and it has cost the Government more to produce that meal than has been charged to the consumer. [89]

Q. So the portion of the meal subsidized by the Government is not subject to the state sales tax?

A. That is right.

Q. And the rest of the charge and cost of the meal is subject to the state sales tax?

A. That which the consumer pays for.

Mr. Erickson: That is all.

Recross Examination

By Mr. Sandvig:

Q. What about the Workmen's Compensation Act?

Mr. Erickson: I object as incompetent, irrelevant and immaterial.

Mr. Sandvig: He said that was the only tax.

Mr. Erickson: They have a special agreement with the State on that.

(Testimony of Major R. F. Ebbs.)

Q. Do you pay a Workmen's Compensation state tax?

Mr. Erickson: I object to this.

The Court: I feel the same way about that as I did about many of the questions you asked. I will let him answer.

A. The Workmen's Compensation is handled under a special arrangement with the State of Washington.

Q. Is that a contract between the United States and the State of Washington, or is it a congressional act or a state act, or who had the authority to make such an arrangement? [90]

Mr. Erickson: I object to the authority. He can tell what it is.

The Court: Tell what the arrangement is.

A. The arrangement is again the revolving fund deposit from which claims are paid, as decided by the proper state authorities.

Q. In other words, they do not pay it directly to the State? A. That is right.

Q. Is that correct? A. That is right.

The Court: You set up a fund in lieu of the state compensation fund, is that it?

A. Yes, sir.

Q. (Mr. Sandvig): It is paid by the State of Washington, is it not, direct? I have had several of them at Hanford, and they are paid directly by the State of Washington, are they not?

A. In this case the Government carries its own insurance for such claims.

(Testimony of Major R. F. Ebbs.)

Q. You mean if someone is injured like a carpenter or a builder, he isn't entitled to compensation under the state law?

A. He is entitled to compensation under the state law, and it is paid——

The Court: The compensation is paid in conformity with the state law? [91]

A. Yes, sir.

The Court: But out of a fund which the Government sets up.

Mr. Sandvig: That is all I can think of right now. I have asked too many foolish questions already.

(Witness excused.)

E. E. RIGGIN,

called as a witness by the Plaintiff, first duly sworn,
testified as follows:

Direct Examination

By Mr. Erickson:

Q. Will you state your name, please?

A. E. E. Riggin.

Q. What is your business, Mr. Riggin?

A. Assistant Chief Accounting Officer of the E. I. du Pont de Nemours Company.

Q. How long have you been such?

A. I have been with the company 17 years. For four years I was Assistant Chief Accountant.

Q. Are you familiar with the relationship be-

(Testimony of E. E. Riggins.)

tween the E. I. du Pont de Nemours Company and the Olympic Commissary Company?

A. Yes, sir.

Q. How about the sale of meal tickets, are you familiar with the system used at Hanford? [92]

A. Yes, sir.

Q. Will you explain the sale of meal tickets and how the proceeds from the sale of meal tickets are handled by the Olympic Commissary Company?

A. The meal tickets themselves are purchased both by the E. I. du Pont de Nemours Company, and the Olympic Commissary Company. They are sometimes purchased directly by the Olympic Commissary Company, and sometimes they are purchased directly by the du Pont company, and if the Olympic Commissary Company purchases them, they submit their invoices to us, after paying the check, after paying the vendor, and we sent the check to the Olympic Commissary Company.

The Court: You mean the physical act of buying the tickets from the printer?

A. Yes, sir. That is done both by the du Pont company and the Commissary company. These invoices—after the check is drawn and the check is retained by the Olympic Commissary Company, then those invoices are forwarded to us for approval, and payment, subject to the rules and regulations laid down by the Government audit section. After the bills are paid by us—

Mr. Sandvig: Who do you mean by “us”?

A. The E. I. du Pont de Nemours Company. We

(Testimony of E. E. Rigglin.)

forward them a check and upon the receipt of that check they in turn [93] forward their check to the vendor—the printer, in this case. After we have forwarded the Olympic Commissary Company our check in payment of that invoice, we in turn bill the Government through the regular public voucher form, and we receive a check for that. That covers the purchase of the tickets.

Q. How is the money from the sale of tickets handled?

A. The money from the sale of tickets is handled in two methods. Some are sold by the Olympic Commissary Company for cash, and others are sold by the payroll deduction plan. Those sold for cash daily, the cash is accumulated, counted and checked and verified and deposited in a bank account in the name of the E. I. du Pont de Nemours Company—not to the account of the Olympic Commissary Company, but in the name of the E. I. du Pont de Nemours Company—which is the account in which we have formerly made our deposit of the original advance. This money together with the advance at the time we opened the bank account, is used as a revolving fund for payment of all bills covering the work or expenses on the project. The E. I. du Pont de Nemours Company has no money on this project. All payments are made from funds supplied by the Government.

Q. So that the money from the sale of meal tickets goes into the general fund? [94]

A. It goes into the du Pont general fund for

(Testimony of E. E. Riggins.)

carrying on the business of the Hanford Engineer Works.

Q. And out of what funds are the groceries and meats and supplies for the mess halls paid?

A. They are purchased by the Olympic Commissary Company from their own funds—shall we say in a funny sort of way. They purchase it and draw the check and hold the check until we give them Government money, and then they mail the check, but in most instances or in all instances they have Government funds supplied by us prior to the time of paying the bills, and there is a question whether you would call it Government funds or Olympic Commissary Company funds.

Q. How do you explain that kind of accounting?

A. I cannot. The only way I can explain it, I would say they do not have the necessary capital to carry on the business, and therefore they must wait for reimbursement first. It is not good accounting.

Q. I hand you plaintiff's identification "T", and ask you to state what that is, in your own language.

A. I will have to call it by pages.

Q. First, they relate to what—all those papers?

A. That is a difficult question, because several are records of purchases and invoices and public vouchers. In other words, we have the entire result. I can start at the front.

Q. All right. [95]

A. The first is a record of purchase. It is a document made out recording from whom we have received quotations. From this the vendor has been

(Testimony of E. E. Rigglin.)

selected by the Olympic Commissary Company, and the product purchased in this case is 1,250 cases of milk at a price. The McClintock-Trunkey Company was selected as the low bidder. This is the record of the bidder. This is the copy of the purchase order which covers the actual purchase as submitted to the low bidder. This is the invoice received by the Olympic Commissary Company from the vendor, covering the billing of said milk. This is the total price. This is the check number, and this is the date it was paid, if you can call the date of the check the date of payment. This is the receiving report showing receipt of the product. This is what is known as a public voucher, a billing to the Government by the du Pont company, who has already paid the Olympic Commissary Company for these items. In this case this is a nonpayment voucher, a credit to apply to payments previously made to carry on the work, and at times we find we may have more capital than is necessary and we send it back in the form of a check or in the form of a credit rather than a reimbursement, and not carry more money than is necessary, so we can distribute the money around the country as much as possible. This is the detail figure backing up the public voucher. There may be forty items billed on this. This is just a record of [96] the nonpayment voucher, and this is the billing to us.

Q. I call your attention to the first sheet on exhibit "T" for identification, and ask you whether

(Testimony of E. E. Riggin.)

or not the order has been approved by the Government?

A. Yes, sir. The order must be approved because it is more than \$2,000.00, and there must be prior approval by the Government prior to the time the Olympic Commissary Company can make the purchase.

Q. And if it is under \$2,000.00?

A. It may be approved afterwards. The Government cannot hope to approve all small items, and they selected the amount of \$2,000.00, and over that amount they must approve it prior to the purchase.

Q. Are you familiar with the title to the food when it is prepared in the mess halls?

A. Yes, sir.

Q. Whom would you say that food belongs to?

Mr. Sandvig: Oh——

The Court: I will sustain the objection. This is an officer of the du Pont company, and not of the Government.

Mr. Erickson: May I ask this officer if du Pont owns the food?

The Court: No.

Mr. Erickson: I offer this in evidence. [97]

Cross Examination

By Mr. Sandvig:

Q. As I understand it, this first sheet, these bills are paid by the Commissary company?

A. You are not far enough down for that.

Q. Yes. That is paid by the Olympic Commissary Company to whomsoever it is purchased from?

(Testimony of E. E. Rigglin.)

A. Yes, sir.

Q. And the Commissary company gives its check for it? A. Yes, sir.

Q. And the yellow sheet shows where the du Pont people pay to the Olympic Commissary people the amount? A. Yes, sir.

Q. In other words, the Olympic Commissary Company is paid by the du Pont company all the time?

A. For the time being. The Government can pay direct to the Olympic Commissary Company at any time they deem it necessary.

Q. There is no contract between the Olympic Commissary Company and the Government, is there? They are just subcontractors under du Pont? A. That is right.

Q. There is no fiduciary relation or agency or any other relation between the Olympic Commissary Company and the Government? [98]

A. I do not think I can answer that.

Mr. Sandvig: I think it does call for a conclusion.

Mr. Erickson: I would like to ask permission to substitute photostatic copies for the originals.

Mr. Sandvig: That is all right.

The Court: It may be admitted.

(Vouchers, invoices, etc., admitted in evidence as plaintiff's exhibit "T".)

[Printer's Note: Plaintiff's Exhibit "T" set out in full at page 268.]

(Testimony of E. E. Riggin.)

Mr. Erickson: I would like to offer one exhibit that was not offered, at this time, exhibit "C".

The Court: It may be admitted, subject to the same objections.

(Meal ticket admitted in evidence as plaintiff's exhibit "C".)

[Printer's Note: Plaintiff's Exhibit "C" set out in full at page 187.]

Mr. Erickson: The Government will rest.

The Court: All right, Mr. Sandvig.

Mr. Sandvig: I take it for granted Your Honor is going to take this under advisement.

The Court: Yes.

Mr. Sandvig: As a matter of fact, I am not going to put my client on the stand. May I have until tomorrow morning to decide whether I will rest or not at this point? I might have a couple of questions to ask after I examine the exhibits. [99]

Mr. Erickson: Some of these witnesses are planning on going home. Do you want to keep them over until tomorrow morning?

Mr. Sandvig: No; that is asking too much. I don't think we should keep them here.

The Court: The witnesses will be excused, and the case will go over until 9:30 tomorrow morning.

(An adjournment was then had to the hour of 9:30 o'clock a.m., October 6, 1944, at which time all parties being present as heretofore, the trial was resumed as follows, to-wit:)

Mr. Sandvig: We rest.

The Court: How soon can you get your brief in, Mr. Erickson?

Mr. Erickson: Can you give us two weeks?

The Court: That is all right.

Mr. Sandvig: May I have ten days after that to answer?

The Court: Yes; and you may have five days to reply.

Mr. Sandvig: I assume the trial is still in progress and the bond stands?

The Court: Yes.

(This cause was then adjourned.) [100]

[Title of District Court and Cause.]

COURT REPORTER'S TRANSCRIPT OF TESTIMONY

Be It Remembered that the above entitled and numbered cause came on for hearing on the taking of additional testimony, on motion of the plaintiff, before the Hon. L. B. Schwellenbach, Judge, at the Federal Building, at Yakima, Washington, at the hour of 10:00 o'clock a.m., April 11, 1945; the plaintiff appearing by Mr. Harvey Erickson, an Assistant United States Attorney for said District, and the defendant appearing in person and by his attorney, Mr. Ole Sandvig;

Whereupon the following proceedings were had and testimony given, to-wit:

Mr. Erickson: May it please the Court, the Government is ready in the matter of the United States

vs. Haugen, to present further testimony as to both contracts, the one between the United States Government and the du Pont company, and the du Pont company and the Olympic Commissary Company, in conformity with the Court's order in the reopening of the case. [101]

The Court: Mr. Erickson, you may call your witness, and you may make your objection, Mr. Sandvig, when he asks his first question.

Mr. Sandvig: Yes.

LT. COL. RALPH G. CORNELL,

called as a witness by the Plaintiff, first duly sworn, testified as follows:

The Court: Do not answer the first question, Colonel, until Mr. Sandvig has had an opportunity to object.

Direct Examination

By Mr. Erickson:

Q. Will you state your name, please?

Mr. Sandvig: At this time, if the Court please, I want to object to the introduction of any evidence in this case—any further evidence in the case—on the ground and for the reason that the defendant has already been dismissed from the charge predicated against him, and that he has been in former jeopardy.

I just want to make this observation at this time. Your Honor wrote an opinion of the Court. It was signed by Your Honor. You went into the facts. You make your conclusions at considerable length.

(Testimony of Lt. Col. Ralph G. Cornell.)

I do not know of any particular form of findings of fact and conclusions of law or decree or judgment that are required, but you go into it at great length.

The Court: I say at the end that the action must be dismissed. [102]

Mr. Sandvig: Yes. And I say it is dismissed.

The Court: I will overrule the objection. There was no order of dismissal entered, as I construe it.

Mr. Sandvig: I can argue it at length later on, but I think this is an order of dismissal.

The Court: My present understanding at least is that an opinion of the Court is not an order of the Court. It requires a formal order to constitute a formal dismissal. I held under the facts as they were presented at the previous hearing, in view of the necessity which I felt I was under to exclude all the testimony of Major Ebbs, in so far as it referred to the contract, that the Government had not proven its case. I said it must be dismissed under those circumstances, but I did not actually dismiss it, so for the present I will overrule the objection, and the witness may proceed to testify.

Q. (Mr. Erickson): Will you state your name, please?

A. Ralph G. Cornell.

Q. What is your business?

A. I am the legal advisor to the Chief Engineer at Washington, D. C., on contracts and claim matters, and general legal problems.

Q. Are you connected with the United States Army?

(Testimony of Lt. Col. Ralph G. Cornell.)

A. Yes, sir. I hold a commission as Lieutenant Colonel in the United States Army, at the present time on an inactive status. [103]

Q. How long have you been on an inactive status? A. Since January 9, 1945.

Q. Directing your attention to the contract between the United States Government and the E. I. du Pont de Nemours Company for the construction of the Hanford Engineer Works, are you familiar with that contract? A. Yes, sir.

Q. How do you happen to be familiar with that contract, Colonel?

A. I served from the first of September, 1942, until I reverted to an inactive status, as chief of the legal staff of the Manhattan District, in which capacity I had charge of the negotiation of all contracts, and supervision in the drafting and execution of those contracts.

Q. Did you have charge of and supervision over the drafting of this contract for the construction of the Hanford Engineer Works between the United States Government and the E. I. du Pont de Nemours Company? A. I did.

Q. Are you familiar with the original contract?

A. I am.

The Court: I should like to have some testimony from this witness as to his background in reference to his legal training, in view of the suggestion I made in the opinion. [104]

Q. Will you state what your legal education has been, first?

(Testimony of Lt. Col. Ralph G. Cornell.)

A. I am a member of the bar of the District of Columbia, and of the Maryland Bar, the District Court of Appeals, and the Supreme Court of the United States.

Q. How long have you been a practicing attorney? A. About 23 years.

Q. During that time have you worked for yourself or have you worked for the United States, or just what has been the nature of your practice in those 23 years?

A. I was in private practice for myself about two years after I was admitted to the bar, and subsequent to that time I have been acting in a legal capacity with different branches of the government service.

Q. Are you a graduate of a law school?

A. Yes, sir.

Q. Which law school?

A. The George Washington University.

Q. Are you familiar with the contract I referred to a moment ago, Colonel? A. I am.

Q. Do you have with you an original of that contract?

A. I have with me an original copy of the du Pont contract, and an original copy of the Olympic Commissary contract.

Q. How many originals are there of the contract between the United States Government and the E. I. du Pont de Nemours Company [105]

A. Three copies.

(Testimony of Lt. Col. Ralph G. Cornell.)

Q. You have one of the three with you?

A. That is right.

Q. Where are the other two copies?

A. All construction contracts are executed in triplicate. That means three original copies. One copy is furnished to the contractor, one copy is furnished to the General Accounting Office, and in the case of War Department contracts, one copy is furnished to the particular technical service, in this case the Office of the Chief of Engineers.

Q. Now that contract between the United States Government and the E. I. du Pont de Nemours Company, is that a secret or a public contract, or how is it classified?

Mr. Sandvig: That calls for a conclusion of the witness, whether it is secret.

The Court: I will sustain the objection. You can ask what was done. The witness can explain what was done with reference to the various classifications of contracts.

Q. Yes. What was done by the War Department in regard to making various classifications in regard to contracts?

A. Under the regulations of the War Department contracts are classified as secret, confidential and restricted, according to the nature of the contract, and the content and the nature of the work covered by the contract. [106]

Q. And the particular contract between the Government and the du Pont company is in which category?

(Testimony of Lt. Col. Ralph G. Cornell.)

Mr. Sandvig: I object to that as calling for a conclusion. There must be some semijudicial determination as to what type of classification it would be put in.

The Court: The objection is overruled.

A. Under the regulations of the War Department the determination as to the classification of the contract is fixed, of course, first of all, and the Secretary of War, the Undersecretary of War, the commanding generals of the various service commands and the commanding general of each post or station, may determine under the army regulations whether a contract should be classified and the character of the classification.

Q. How has this contract been classified?

Mr. Sandvig: Objection.

The Court: The objection is overruled.

A. This contract has been classified as secret.

Q. Are you familiar with the contract between the E. I. du Pont de Nemours Company and the Olympic Commissary Company? A. I am.

Q. Did you have anything to do with the negotiation of that contract?

A. I had nothing to do with the negotiation of it. [107]

Q. How many times have you read that contract, just roughly speaking?

A. The contract was referred to the commanding officer of the Manhattan Engineer District for his review prior to its approval, and at that time

(Testimony of Lt. Col. Ralph G. Cornell.)

I reviewed the contract and recommended it for approval.

Q. Have you read that contract a number of times or not? A. Yes, sir.

Q. Are you familiar with its provisions?

A. I am.

Q. Do you know of your own knowledge whether or not the Secretary of War and the Undersecretary of War of the United States approved the classification?

Mr. Sandvig: I object to that as calling for a conclusion of the witness. The declaration of the Secretary of War would be the best evidence.

The Court: The objection is overruled.

Q. Of the Government and the du Pont company contract?

A. This particular contract under our regulations was required to be presented to the Secretary of War or the Undersecretary of War for his approval. It was presented to him. The contract bears his signature of approval, which approval goes to the form of the contract—the contents of the contract—its classification, and all other matters pertaining to the document. [108]

The Court: You said the Secretary of War or the Undersecretary of War. Which one do you mean?

A. The Undersecretary of War acts on all matters relating to contracts.

The Court: Who was Undersecretary of War at that time?

(Testimony of Lt. Col. Ralph G. Cornell.)

A. The Undersecretary was Robert Patterson.

Q. (Mr. Erickson resuming): Going to the contract between the E. I. du Pont de Nemours Company and the Olympic Commissary Company, will you give the category that contract falls into, whether or not it is secret or restricted?

Mr. Sandvig: The same objection.

The Court: The objection is overruled.

A. That contract falls into the classification of a restricted contract.

Q. What do you mean by a restricted contract?

A. A restricted contract is a form of a secret contract. The difference between secret and restricted governs the handling of the contract, the people who are authorized to see it, and the manner in which it has to be transported and mailed, and matters of more or less of an administrative character, and the handling and the performance of it. A restricted contract is not quite so—the procedure is not quite so restricted as a secret contract. A secret contract cannot be shown to persons or even employees of the Government who do not have some part to [109] play in the performance of it, and then it is the practice usually to confine their information to only such portions of it as are necessary in the performance of their particular duties. A restricted contract can be handled by any employee of the Government. The primary thing to be accomplished under a restricted contract is to prevent its being—any information in connec-

(Testimony of Lt. Col. Ralph G. Cornell.)

tion with it being furnished to the press or publicized in any manner, shape or form.

Mr. Sandvig: A restricted contract can be handled by any employee of the Government?

A. Yes, sir.

Mr. Sandvig: Including the judges of the District Courts?

A. You are asking me a close question. It can be explained to and handled by anyone who has a function to perform in the performance of it. Whether that would include the Federal Judge, I do not know. However, I do not think I would hesitate to show the judge the contract if he wants to see it.

Q. (Mr. Erickson resuming): It is not permissible to show any of those classifications of contracts to the general public? A. That is right.

Q. Now directing your attention to the contract between the United States and the E. I. du Pont de Nemours Company [110] for the construction of the Hanford Engineer Works, on what date was that contract entered into, Colonel?

A. The Olympic Commissary Company contract?

Q. No; the contract with the du Pont company.

A. The letter contract was issued October 3, 1942. The formal contract was dated November 6, 1943.

Mr. Sandvig: May the record show the witness is now referring to one of the original contracts in his testimony?

(Testimony of Lt. Col. Ralph G. Cornell.)

Mr. Erickson: Yes.

The Court: Yes.

Q. You say the contract with the du Pont company was entered into on October 3, 1942?

A. That was a letter contract. In contracting for large projects of this kind, it has been customary during the war to start the contract off with a letter contract, which is merely an order to a contractor that the Government will place a contract with him for certain work, and that he will proceed immediately to start with his preparations for the performance of that work, and that letter provides a formal contract will be entered into as soon as the data and information are sufficiently accumulated to do so.

Q. The formal contract was entered into later?

A. Yes, sir. [111]

The Court: November 6, did you say?

A. November 6, 1943. They were operating under a contract in the meantime, but it was a letter contract.

Q. (Mr. Erickson resuming): Now the contract between the E. I. du Pont de Nemours Company and the Olympic Commissary Company was entered into at what time, Colonel—on what date?

A. March 25, 1943.

Q. Now directing your attention to the original contract between the United States Government and the E. I. du Pont de Nemours Company, what provision is made in that contract about property

(Testimony of Lt. Col. Ralph G. Cornell.)

used in the prosecution of the work on the Hanford Engineer Works?

Mr. Sandvig: I object to that as not being the best evidence. The witness has the contract before him. They have opened the doors now, and the contract is no doubt admissible. He has been using it for evidence, and certainly the contract is the best evidence. No matter how good a lawyer he may be, we might disagree on its interpretation. The contract itself is the best evidence.

The Court: The objection is overruled.

Mr. Sandvig: The last time I was accused of not objecting to something, but I want this objection to go to all this testimony. I thought I was objecting until I was getting to be a pest. May it be understood my objection [112] goes to all this testimony?

The Court: The objections you made during the previous testimony go to all the testimony relating to the contract, and your objection that it is not the best evidence is overruled, for the reasons I stated in my opinion. You do not need to object, if you can resist the temptation to do so, and you may desist from making the objection. Go ahead.

A. I do not know that I understand your question.

Q. What provision does the contract contain about the title to the property, the personal property, machinery and equipment, and all things used by the du Pont company in the prosecution of the work on the Hanford Engineer Works?

(Testimony of Lt. Col. Ralph G. Cornell.)

A. Under the du Pont contract the Government either furnishes or reimburses the du Pont——

Mr. Sandvig: I did not get that.

The Court: Either furnishes or reimburses du Pont.

A. —for all property, materials and supplies of whatever nature purchased or furnished for the performance of the work, with the exception of certain equipment that du Pont is authorized to furnish, for which they are reimbursed on a rental basis.

Q. Do you know what equipment the du Pont company furnishes for which it is to be reimbursed on a rental basis?

A. I do not know exactly what property they furnish. It was [113] contemplated that they might furnish certain processing equipment, and possibly some construction equipment. How much they actually furnished I do not know.

Q. What provision does the contract contain about the title to the personal property that is used on the job by the du Pont company?

A. The contract provides that all property, supplies and materials which are purchased by du Pont, and for which they are reimbursed under the contract, will vest in the United States upon its delivery at the site of the work, or such other place as the contracting officer may direct.

Mr. Sandvig: In other words, it is the property of the du Pont company until such time as it is delivered?

(Testimony of Lt. Col. Ralph G. Cornell.)

A. I suppose it would be technically.

Q. (Mr. Erickson resuming): How are purchases made by the du Pont company and paid for by the United States. Will you explain that?

A. How they are made?

Q. Yes. Explain what the contract provides in that regard.

A. The contract provides that du Pont will make all purchases and do all procuring under the regulations of the War Department, which require some competition, and the du Pont company will place its own orders for the purchase, and that the materials will be delivered at such and such a place. After they are delivered the materials are [114] paid for by du Pont from a fund which has been furnished to du Pont by the Government.

The Court: A revolving fund?

A. A revolving fund. The contract provides that all this work will be done without any expense or cost or liability of any nature, shape or form to the du Pont people, and with the understanding and agreement that all monies required in financing the project will be furnished in advance by the Government. These monies are furnished by the Government to du Pont. They are placed in a special fund, which we call a revolving fund, and all vouchers which are payable by du Pont are paid from this fund. Likewise under the contract du Pont is required to make all collections of all monies due the Government in the operation of the project, and those monies when collected are re-

(Testimony of Lt. Col. Ralph G. Cornell.)

quired to be put in this fund. That is why it is called a revolving fund. The Government puts in the money to make it current, and the du Pont company collects money and puts it in the fund, and that goes on.

Q. What does the contract provide about additions to the fund if the fund should run short?

A. After the fund reaches a certain level the Government makes du Pont another advance, and that is deposited in the revolving fund.

Q. Does the contract provide that the du Pont company shall [115] advance any of its own money, or arrange for any money from any other source than the Government in the project of the Hanford Engineer Works? A. Not at all.

Q. What does the original contract provide with reference to subcontracts, such as the contract with the Olympic Commissary Company?

A. It provides that du Pont will furnish all facilities for the project, including commissary mess halls, hospitals, and various other facilities, and it provides with the consent of the contracting officer du Pont may secure the services of any third person for the performance of any part of its functions, which would include the operation of mess halls, dormitories, cafeterias, and so forth.

Q. Now what does the contract provide between the du Pont company and the Olympic Commissary Company about the furnishing of food to the workers on the project?

(Testimony of Lt. Col. Ralph G. Cornell.)

Mr. Sandvig: I want to make a special objection on that. You are now referring to the Olympic Commissary Company's contract with the du Pont company?

Mr. Erickson: Yes.

Mr. Sandvig: I object to that as being hearsay and a conclusion of the witness, and that the Olympic Commissary Company's contract would be the best evidence. The witness himself has testified it is a restricted [116] contract, and it is available to all the employees of the United States. I suppose it has even been shown to counsel for the Government.

Mr. Erickson: No; it has not been shown to counsel for the Government. I can state that.

Mr. Sandvig: I am not curious to read the contract, but this is merely a restricted contract. Certainly the Court should have it available to him to read and study. Otherwise we will convict this man on the conclusions of this witness.

The Court: In the light of the Colonel's statement that the restricted contract would be open for me to examine, subject to the restriction that if I did examine it my comment on it would be limited exclusively to the conclusions I draw from it, and not make a statement of fact of what it contains, I think the objection is well taken, unless the witness states he feels it would be impossible to permit me to examine it. I have no desire to examine it particularly.

(Testimony of Lt. Col. Ralph G. Cornell.)

Q. Can you leave the contract, or do you have to take it with you?

The Court: If I examined it, I would take the time right now.

Q. If you have any objection to the Court examining it, you may say so, Colonel. [117]

A. I think it comes within my authority to permit the Court to examine the contract, and I am perfectly willing to do so.

The Court: The Olympic contract?

A. Yes, sir.

Q. (Mr. Erickson): How long a contract is that?

A. Or I think I can quote any paragraph out of the contract that relates to the matter you want to get information on.

Q. Probably it would aid the Court if you would mark those paragraphs which are applicable, and let the Court read the contract.

A. It is not a very lengthy contract.

The Court: You may go ahead, with the understanding when you get through I will examine the whole contract, with the purpose of seeing whether or not there is anything else in the contract which would negative the conclusions you draw from the contract, or the quotations you give from the contract. With that understanding I shall overrule the objection.

Q. You may answer.

A. The contract provides that the Olympic Commissary Company will perform the service of

(Testimony of Lt. Col. Ralph G. Cornell.)

procuring food and operating the mess halls, which was required of the du Pont company under their contract, and the contract provides for the same procedure in purchasing and inspection and payments. [118]

The Court: As between the du Pont company, and the——

A. And the United States.

The Court: How does the Commissary company get into this revolving fund? Does the du Pont company set up a revolving fund for the Commissary company?

A. The Commissary company's contract provides the Commissary company will furnish all personnel necessary to operate these mess halls, and they will do all the procuring of supplies in the purchase and serving of food. It provides the du Pont company may furnish to the Olympic Commissary Company——

Mr. Sandvig: May furnish?

A. Yes; may furnish an advance of funds similar to that which the Government advances to the du Pont company, from which it will make payments of all costs of procuring food, and its operation. I understand that the contract required the furnishing by the Olympic Commissary Company of a bond, satisfactory to the du Pont company, to cover the use of this fund, and I am informed they never did furnish a bond satisfactory to du Pont, and that as a matter of prac-

(Testimony of Lt. Col. Ralph G. Cornell.)

tice they made a purchase of food or materials, supplies, and so forth, and submitted their voucher for reimbursement, and from that paid their various suppliers. That is my understanding of how it was done. The contract itself did not contemplate the [119] Olympic Commissary Company would use any of their funds in the performance of their work. The contract itself is in the nature of a contract for services. They were to furnish the personnel and the experts and people to run the commissary, and the Government paid all costs of running it.

Q. What provision was made in that contract about the title of the food that was purchased for use in the mess halls?

A. It is the same paragraph that appears in the du Pont contract. I would be very glad to read that.

Q. Do you think you can read that paragraph?

A. Yes, sir.

Q. Will you read it?

A. "Title to all materials, tools, machinery, equipment and supplies furnished by the subcontractor hereunder, for which the subcontractor shall be entitled to reimbursement under Article 2—" Article 2 has to do with reimbursement of cost—"shall vest in the Government on delivery at the plant or at such point or points as the contracting officer may designate, on approval in writing, provided, that the right of final inspection and acceptance or rejection of such materials, tools,

(Testimony of Lt. Col. Ralph G. Cornell.)

machinery, equipment and supplies, at such place or places as he may designate in writing, is reserved to du Pont."

Mr. Sandvig: Will you read that last again?

A. About inspection?

Mr. Sandvig: Yes.

A. "Provided, that the right of final inspection and acceptance or rejection of such materials, tools, machinery, equipment and supplies, at such place or places as he may designate in writing, is reserved to du Pont. Provided, further, that upon such final inspection the subcontractor shall be given notice of acceptance or rejection, as the case may be. In the case of rejection the subcontractor shall be subject to removal of rejected property within a reasonable time." That is the standard provision of all contracts of this nature.

Q. What provision is made in the contract about the payment of labor used in the mess halls?

A. The contract provides the Olympic Commissary Company shall be reimbursed by du Pont for all labor, the purchase of all materials and the purchase of all equipment that may be necessary to run the mess halls, with the exception of certain equipment which the Olympic Commissary Company were themselves to furnish, and in connection with this they were paid a rental of so much a month by du Pont for the use of them.

Q. What provision does the contract make in the Olympic Commissary contract about the sale of meal tickets?

(Testimony of Lt. Col. Ralph G. Cornell.)

A. The contract does not itself go into the details of how [121] the Olympic Commissary Company are to operate the mess halls. It does provide, however, that they will make collection of all monies received or due the Government, and the pertinent paragraph on that reads as follows: "The subcontractor shall pay to du Pont weekly for the account of the Government all sums received by the subcontractor from the operation of the facilities." And of course when du Pont receives that it goes into the revolving fund the same as the collections made by du Pont itself.

Q. What are the provisions of the Olympic Commissary Company contract regarding any income the Olympic Commissary Company receives, as to which fund it shall go into.

A. The contract provides that all funds collected by them shall be turned over to du Pont and accounted for as Government funds. That includes the collections of any kind, shape or form, they make.

Mr. Sandvig: Is there anything dealing with that that you could read? Can you read that paragraph?

A. The paragraph that covers it is the paragraph I just read a few minutes ago.

Mr. Erickson: You may examine.

A. It goes into somewhat of details. It requires them to take advantage of all trade discounts, rebates, salvages, commissions, bonifactions, and it goes into elaborate [122] detail to show that the

(Testimony of Lt. Col. Ralph G. Cornell.)

Olympic Commissary Company must take advantage of every credit that the Government is entitled to, and account for that to du Pont for deposit in the Government revolving fund.

Mr. Erickson: One more question.

Q. Under the Olympic Commissary contract what provision is made in that contract about title to food that is purchased by the Olympic Commissary Company?

A. I read that paragraph a moment ago.

Q. Is there any other clause in the Olympic Commissary contract that would alter the effect of that clause in any way? A. No.

Mr. Erickson: That is all. You may examine.

Cross Examination

By Mr. Sandvig:

Q. What classification do you say the du Pont contract is in? A. That is secret.

Q. And the other one is restricted?

A. Yes, sir. I would be very glad to show you the title page of it.

Q. I would like to have you open the door so I could look at all of it.

The Court: Let me see the title page. I am [123] familiar with Judge Patterson's signature. I know him.

A. That (indicating) is the title page, and that is the classification, and that is the approval Judge Patterson gave it, and this is the approval of the Chief of Engineers, and over at the end of it——

The Court: Where is the secret part of it?

(Testimony of Lt. Col. Ralph G. Cornell.)

A. Here (indicating) it is marked "Secret". Each page is marked "Secret".

The Court: I can testify that that is Judge Patterson's signature.

A. At the end of it, and I would be very glad to show you the execution of it.

Mr. Sandvig: Yes. It is a duplicate original?

A. Yes, sir. I am very glad to show you anything I can, without being court martialed.

Mr. Sandvig: I will not ask you to do that.

Q. (Mr. Sandvig): The other one is merely a restricted contract, available to any employee of the United States?

A. That is right.

Q. There would be an objection to me seeing that?

A. In its entirety. I would be very glad to show you any of the administrative portions, relating to this particular thing.

Q. It would be hard for me to get at it, but you will let the Court take it to his chambers? [124]

A. Yes, sir.

Q. Now, as I get it, there is a fund set up to reimburse the du Pont company from the Government?

A. That is right.

Q. But there is no fund set up by the Government to reimburse the Olympic Commissary Company?

A. There is a provision in the contract for such a fund to be advanced by du Pont from their revolving fund to the Olympic Commissary Company,

(Testimony of Lt. Col. Ralph G. Cornell.)

under which it operates the same as the du Pont company does.

Q. The Olympic company gets its compensation by way of rent?

A. They get their compensation by a lump-sum payment of so much a month for their services.

Q. If they go down and buy a sack of sugar the du Pont company owns that sack of sugar until there is an adjustment made?

A. I would say under the contract the moment it is delivered at the site of the work the title passes to the United States, regardless of whether the purchase is made by an employee of the Olympic Commissary Company or the du Pont company.

Q. Is there any paragraph of that Olympic Commissary Company contract that you could read as to that?

A. Yes; I can read that, if you would like to hear it.

Q. Yes.

A. That is a standard form of paragraph that is in all con- [125] tracts, and therefore I would consider it proper to read it: "Title to all materials, tools, machinery, equipment and supplies used in the construction or operation of the plant for which the contractor shall be entitled to reimbursement under Article 12, is vested in the Government at the plant or at such point or points as the contracting officer may designate in writing, provided the right of final acceptance or rejection of such materials, tools, machinery, equipment and supplies, at such place

(Testimony of Lt. Col. Ralph G. Cornell.)

or places as he may designate in writing, is reserved to the contracting officer. Provided, further, that upon such final inspection the contractor shall be given written notice of acceptance or rejection as the case may be. In the event of rejection the contractor shall be responsible for the removal of rejected property within a reasonable time."

Q. Do you know the policy there as to the—it says "must be accepted by written notice." What about the Olympic Commissary Company, is there a written notice of acceptance of that—in other words, title passes to the Government upon acceptance, as I understand that contract, written acceptance?

A. In cases where the Government makes a final inspection at the point of delivery the contract provides that form of notice. [126]

Q. Written notice of acceptance?

A. How soon it is given I do not know.

Q. If it was rejected it would be the property of the Olympic Commissary Company?

A. Either that or title would revert back from the Government. I do not know which way you would construe it. That is getting rather technical.

Q. That is what I was afraid of in the interpretation of those contracts. Is there any provision about meal tickets in that contract?

A. No, sir. The contract does not go into detail as to how the Olympic Commissary Company shall operate.

(Testimony of Lt. Col. Ralph G. Cornell.)

Q. The reading of the terms of the contract in the case of the Olympic Commissary Company accepting some forged meal tickets they could not be reimbursed for that, could they?

A. I do not understand the question, I guess.

Q. The Olympic Commissary Company gives out meal tickets. I forge them and pass them, the Government would not have to stand that?

A. If you forged a meal ticket, it would seem to me if you sold it and received money for it, you are in possession of money which is accountable to the Government.

Q. In other words, they accept one of the tickets I gave them—it is forged—would the Government reimburse them for accepting the forged meal ticket? [127]

A. They certainly would not do it if they knew it was forged.

Q. I forge the ticket and get meals on it, and the Government subsequently finds out it is forged, would they reimburse the Olympic Commissary Company for accepting the forged ticket?

A. They could. It would be within the discretion of the contracting officer. If he felt convinced the Olympic Commissary Company acted in good faith, it would be within his discretion, I think.

Q. Is there anything in the contract with respect to that?

A. No, sir. I base that on general government policy in the performance of contracts.

(Testimony of Lt. Col. Ralph G. Cornell.)

Q. The Government would not have to reimburse the Olympic Commissary Company if they accepted a bunch of forged tickets?

A. I do not think they would have to, but I think under the general practice they would, if they found the Olympic Commissary Company acted in good faith, and could not have known of the fact.

Q. But they would not be required to do it, would they?

A. I do not think so. Of course, that is purely my opinion. If they refused to pay it, and it was taken to court, I do not know how the court would rule. I do not know of any comparative case.

Q. I think that is all. Are you going to be here? I may [128] think of something else.

A. Yes, sir; I can stay here as long as you would like to have me. I will be here for some time.

Redirect Examination

By Mr. Erickson:

Q. If a meal ticket on the Olympic Commissary Company were forged, and the Olympic Commissary Company supplied the meals to the person who forged that ticket, who would lose on that transaction—whom would the loss fall upon ultimately.

A. You mean instead of selling it for money?

Q. Suppose a workman would print the ticket himself, whom would that loss fall upon ultimately?

A. Under the procedure under which we make payments to contractors generally—

Mr. Sandvig: What does the contract provide?

(Testimony of Lt. Col. Ralph G. Cornell.)

A. The contract does not provide anything on that point, because the contract does not mention the use of meal tickets, but I would say whether the loss fell on the du Pont company or the Government would depend on whether du Pont could reasonably be considered as having knowledge, or should have had knowledge, the tickets were counterfeited.

The Court: It is just a straight question of agency. If the Colonel's interpretation of this contract is correct, that du Pont is the agent of the Government, and [129] in turn the Olympic Commissary Company is the agent of the Government, the question of the liability of the agent is one depending upon whether or not he has so conducted himself in carrying out the obligations which the agency imposed upon him that he has met those obligations in a proper manner. If he was careless then he would be liable. If he was not careless he would not be liable.

The Witness: That is right.

The Court: When I was seventeen years old I was a hotel clerk, and I cashed a check for \$5.00. I did not think I was careless, and I felt that I was justified in cashing the check, but the hotel said I had to pay the \$5.00, and I have never forgiven them since that time, but I had the matter called to my attention at the age of seventeen years. I have fretted about that \$5.00 ever since, and this is the same proposition.

(Testimony of Lt. Col. Ralph G. Cornell.)

Recross Examination

By Mr. Sandvig:

Q. As I get it then, the Olympic Commissary Company is merely reimbursed, and paid a rental valuation for the use of some of their equipment, and they are reimbursed—strictly a question of reimbursement. In other words, they operate the business, and own the property, except they are reimbursed?

A. They do not own any property, except the property they [130] furnish and are paid a rental for. At the time any other property gets into the commissary——

Q. Is the Olympic Commissary Company a private corporation?

A. I will see. This (indicating) says it is a contract between du Pont and the Olympic Commissary Company," a corporation organized and existing under the laws of the state of Illinois, with its principal offices at Chicago, Illinois, hereinafter called the sub-contractor."

Q. Have you read the articles of incorporation?

A. No, sir; I have not.

Q. You don't know whether they have authority to enter into such a contract as this or not?

A. No, sir.

The Court: Any further questions?

Mr. Erickson: That is all.

Mr. Sandvig: That is all.

(Witness excused.) [131]

CAPT. MORTON K. BARRETT,

called as a witness by the Plaintiff, first duly sworn,
testified as follows:

Direct Examination

By Mr. Erickson:

Q. State your name, please.

A. Morton K. Barrett.

Q. You are a Captain in the United States
Army?

A. The reason I pause is that I do not know how
technically correct I would have to be. I am a
Captain in the Army of the United States. It is a
technical question.

Q. Where are you stationed?

A. At Hanford.

Q. What are your duties there?

A. Chief Project Auditor.

Q. What are your qualifications for that job,
Captain?

A. I have a Bachelor's Degree in accounting,
and I have had considerable graduate work in ac-
counting, a year of teaching collegiate accounting,
three years with one of the largest accounting firms
in the country, and four years on active duty in the
auditing of fixed-fee reimbursement work, the last
two years at Hanford.

The Court: What was the accounting firm?

A. Arthur Anderson & Company.

Q. (Mr. Erickson): Are you acquainted with
the construction on the project at the Hanford En-
gineer Works? [132]

(Testimony of Capt. Morton K. Barrett.)

A. You mean the physical construction, what is going on?

Q. Yes. Roughly speaking, who is in charge of the construction, and so forth?

A. Yes, sir. I know that.

Q. What equipment did the E. I. du Pont de Nemours Company furnish on that job?

A. I presume you refer to that equipment which they may have furnished on rental?

Q. Yes. What equipment did they furnish on rental, and what equipment was furnished by the Government, just roughly, if you know?

A. The du Pont company furnished no equipment. The Government furnished a considerable amount of government-owned equipment. Some was leased from third parties, the leases being between the du Pont company and the third parties, the rentals being reimbursable. That equipment leased for construction work was construction equipment, such as bulldozers, caterpillar tractors, drag lines and shovels.

Q. There were no consumer goods like clothing or food?

A. That was leased from third parties?

Q. Yes.

A. No; none of that type of thing was leased.

Q. What equipment did the Olympic Commissary Company furnish when they went in down there as subcontractor?

A. They furnished a small amount, or a small percentage, of a [133] great variety of items. When

(Testimony of Capt. Morton K. Barrett.)

I say small percentage, let us say we needed 10,000 sheets for the barracks, perhaps the Olympic Commissary Company had 500 on hand, and they sent those in, and the Olympic Commissary Company bought the others as a reimbursable item, and as I understand the title went to the Government of the balance of the sheets they purchased.

Q. Did the Government rent the property the Olympic Commissary Company used?

A. Yes, sir. May I go into a little explanation? This type of contract provides generally for the renting of equipment from the contractor, and included in the Olympic Commissary contract there was a stipulation they will furnish such and such equipment, and there is also included in it that they are paid for the rental of that equipment.

Mr. Sandvig: To keep the record straight, I want to object to this testimony.

The Court: I will sustain the objection, and strike all this last answer.

Q. Now, Captain, how was this equipment procured as to the Olympic Commissary Company? Tell how it was procured.

Mr. Sandvig: The same objection.

Mr. Erickson: I submit he can answer that. He is an accountant.

The Court: I will overrule the objection. [134]

A. Which equipment?

Q. The equipment the Olympic Commissary Company used on the operation down there. How was it secured?

(Testimony of Capt. Morton K. Barrett.)

A. There was that which was supplied by the Olympic Commissary Company. They brought it in from outside, and that was rented from the Olympic Commissary Company, and, second, the portion that was procured other than that. It came in in three different ways. Some of it was Government-owned, and——

Mr. Sandvig: I want to object to that. The Court will understand my objection goes to all this.

The Court: I will sustain the objection, when he says it is government-owned. He can say the Government brought it there, as compared with the Olympic Commissary Company bringing it there.

A. The Government brought in some from other army posts operated by the Government. Second, some of it was procured by the Olympic Commissary Company on their own purchase orders, for which they paid their own checks, and were reimbursed by the Government, and lastly in some instances the du Pont company followed the same procedure and brought equipment in.

Q. How about the food?

A. The food was all handled by the issuance of Olympic purchase orders and receiving invoices by the Olympic Com- [135] missary Company, and the issuance of checks by the Olympic Commissary Company, and reimbursement by the Government.

Mr. Sandvig: The same objection.

Q. How was payment made? Trace the mechanics of payment for the food.

(Testimony of Capt. Morton K. Barrett.)

A. First the Olympic Commissary Company would ascertain the need of some particular item of food. If that requirement exceeded \$2,000.00 they requested permission of our office to make that procurement. If the particular procurement was under \$2,000.00 that advance or prior approval was not necessary. However, after obtaining approval on a larger procurement from our office, the Olympic Commissary Company would contact the vendor and issue a purchase order.

Mr. Sandvig: It doesn't make any difference what their procedure was. They may have done everything wrong, but what is material is what the terms and conditions were under this contract. Supposing they wanted to pay for anything and everything.

The Court: As far as I am concerned, you are right; but if the Government wants to make a record they may do it. I do not think it is material. The Colonel testified the Government entered into a contract with du Pont, in which it employed du Pont for the service that it would render, and in that contract the Government authorized the [136] du Pont company to sublet a portion of that contract, and in conformity with that provision of the contract between the Government and the du Pont company, the du Pont company did sublet a portion of the contract to the Olympic Commissary Company. This is not a charge of receiving food from the Government. It is a charge of attempting to defraud the Government. The testimony

(Testimony of Capt. Morton K. Barrett.)

went in in the previous hearing, and I did not think at that time, standing alone, it would be sufficient, and I do not see that it has any value. If there was a jury here I would not let you put it in. I will not pay any attention to it. If you want to put it in, over the objection, you may do so. I think you have it already in the record.

Mr. Erickson: Yes, in thinking back over Mr. Riggin's testimony, I think it is in, and I will withdraw the question. That is all the questions I have.

Mr. Sandvig: I have no cross examination.

(Witness excused.)

Mr. Erickson: We will rest.

The Court: I will take a little time now to look over the contract.

(After a short recess the trial was resumed as follows, to-wit:)

The Court: Will you come forward again, Colonel? [137]

LT. COL. RALPH C. CORNELL,

recalled as a witness for the Plaintiff, further testified as follows:

The Court: I will state that I have examined the contract which Col. Cornell has handed me, which he has described as a subcontract between the du Pont company and the Olympic Commissary Company. I find nothing in it which would in any way negative the testimony of Col. Cornell as to the

(Testimony of Lt. Col. Ralph C. Cornell.)

construction of the contract. There are three matters in the contract which I would like to call to the attention of the witness, concerning which, if he wishes, he can testify. That is Article 5, Article 14, and the signature on the bottom of page 17 (handing contract to witness).

Witness: Article 5 is the standard form of article which goes into all government contracts. I had better take a look at this to see if it has been altered or changed any. That is the standard form that goes into all time government contracts. As a matter of fact, it should not have been included in this contract. We do not include it usually in sub-contracts. For your information, do you want something about the purpose of it, or the operation of it?

The Court: No. Have you any objection to discussing it here?

Witness: No, sir.

The Court: It seems to me it gave to the Undersecretary the power to decide disputes. [138]

Witness: That is right.

The Court: What does it provide in reference to disputes?

Witness: It provides in the event the contractor and the contracting officer cannot agree upon some dispute which arises under the contract, such as whether or not the contractor is entitled to a greater payment than the contracting officer thinks the contractor should have, or whether the contractor thinks that some work is not within the scope of the contract, or any other such dispute that they

(Testimony of Capt. Morton K. Barrett.)

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(Testimony of Lt. Col. Ralph C. Cornell.)

cannot agree upon, it may be appealed by the contractor, within a stated time, to the Secretary of War, and the Secretary of War has created a Contract Appeals Board, before which the contractor can appear and state his case and set forth his claim, if it is based upon a disputed question of fact, and the Secretary of War can make a decision, which as to the facts of the dispute is final and conclusive.

The Court: As to 14?

Witness: I might say I do not know why this article was included in this contract, but it is not customary to put it in the subcontract. In that kind of a contract we usually put in a provision that if the contractor and the subcontractor cannot agree, the dispute shall be [139] referred to the contracting officer, and his decision shall be final. Article 14 is a paragraph on renegotiation. That again is a standard form of paragraph, which is included in all government contracts and subcontracts, and which makes it subject to renegotiation by the Secretary of War or by any agency he sets up to determine whether the contractor has made an abnormal profit or an excessive profit in the handling of the war contract. In other words, that would mean that this contractor could be required to come in and appear before a renegotiation board, set up by the Secretary of War, and submit all financial data relative to the corporation, such as the amount of capital stock, the amount of money received generally from noncontract business, and the amount

(Testimony of Lt. Col. Ralph C. Cornell.)

of money received from the contract business, and a financial statement to show the actual cost on the government business, and the profit, and they determine whether the contractor received an unconscionable profit, and, if so, under the law the contractor is required to refund a certain amount of it back to the Government. The other one is——

The Court: At the bottom of page 17.

Witness: “To be executed by the contracting officer who executed the principal contract named herein, or his successor or his duly authorized representative.” [140]

The Court: I am referring to the approval.

Witness: Yes, sir. The approval is required of the contracting officer in all subcontracts, and this is in the same category. Under the terms of those contracts they have to be approved by the contracting officer who signed the original contract, which was the District Engineer here, or by his successor, if he has been replaced, or by his authorized representative. In view of the fact that the District Engineer is situated a long distance from here, he has designated Col. F. T. Mathias as his duly authorized representative to handle matters of this kind here, and to act for him in all other matters relating to the performance of these contracts.

The Court: Did he approve it?

Witness: Col. Mathias approved this contract, but he did not approve it until after he had submitted it to the District Engineer, and the District

(Testimony of Lt. Col. Ralph C. Cornell.)

Engineer referred it to the legal staff for review, and its recommendation, and then it was sent back to Col. Mathias, and this is his signature.

The Court: That is all I have.

(Witness excused)

Mr. Sandvig: We rest.

Mr. Erickson: That is all.

The Court: Do you want to argue this question again? [141]

Mr. Sandvig: Yes.

The Court: One-thirty.

(A recess was then had to the hour of 1:30 p. m., of said day, at which time, all parties being present as heretofore, Mr. Sandvig presented argument on behalf of the defendant to the Court, and the Court thereupon rendered the following Oral Decision, to-wit)

ORAL DECISION BY THE COURT:

The Court: I am in full accord with Mr. Sandvig's statement that this case is unique. It is unique in practically all of its phases, and because it is unique, and several questions have arisen which are practically questions of first impression, so far as any court is concerned, without in any way indicating any doubt in my own mind as to the correctness of the conclusions I have reached, I will say that I hope the defendant is able and willing to prosecute an appeal in this case, and if he does I will fix the bond in an amount which

will enable him to appeal and remain at liberty. I do not think a \$500.00 bond is sufficient. I will fix it at \$1,000.00.

Mr. Sandvig: It was \$200.00, and he is here on a \$100.00 bond.

The Court: Well, I would fix the bond at \$1,000.00, [142] in the event he wants to appeal.

Now the case was presented first, as I remember it, and we tried it the evening of October 5th, if that is the correct date, last year.

The Government proved, and the defendant has not attempted to deny the fact, that he did cause to be printed a large number of fictitious commissary tickets, which were in such manner and form as to force one to reach the conclusion that the securing of the printing of them and the distribution of them was with the belief or the hope that they sufficiently resembled the genuine commissary tickets that they could be passed and used with the Olympic Commissary Company.

The defendant has not attempted to contest that, and I think he is entitled to some credit for the fact he has not taken the stand and perjured himself about it.

At the first hearing that testimony was submitted, that stage of the case was proved overwhelmingly. The difficulty at the first hearing arose from the inability of the Government to prove its allegation that the Olympic Commissary Company was an agent of the United States. The reasons behind that difficulty and my conclusions concerning it are

outlined in the opinion which I wrote on December 22d, last year. Counsel has kindly referred to it as being a very good statement. I appreciate [143] that. Whether it is good and sufficient or not, at least it was the best I could do. I do not intend to add to it now.

I held then that it was doubtful whether the Government in a case of this kind could make use of secondary evidence to prove the relationship between the Olympic Commissary Company and the United States. I held that they had not submitted the best secondary evidence that was available to them, and, therefore, I held, as the case stood at that time, that the case must be dismissed, That did not constitute a dismissal.

It is true that it is a new question, as is the right of the Government to offer such secondary evidence, but it seems to me the logic of the situation requires that I reach the conclusion that the Government is entitled to reopen its case, and present its best evidence, if it is required to do so.

A dismissal of a criminal action comes as the result of an order of dismissal, either a written order or a direction to the Clerk, with which the Clerk complies, to make a minute entry in the record of the court. Nothing of that kind was done. I wrote an opinion.

In civil cases it is true the appellate court has held an appeal cannot be taken from an opinion. They have held that opinions are not binding on the Court in [144] making findings of fact in civil cases.

The jury returns a verdict of not guilty. That does not release the defendant. I have to sit here and say that the defendant is released and his bond discharged, or he is released from custody, and the Clerk makes an entry of that order.

In some more formal cases it might be deemed advisable for me to sign an order, after the jury has returned a verdict. At least there must be some action on the Court's part, and so that here when I said it must be dismissed, it seems to me in the logic of the situation I would construe that order of dismissal on the facts as I outlined them at the time I wrote the opinion would have to be entered.

Before it was entered by a formal written order or by an entry by the Clerk, the Government made a motion to reopen the case to put in further evidence. That motion was a proper one. I gave considerable study to the question at the time. Frankly it is not available as an authority which completely answers the question, but there are authorities which may be used for the purpose of analogy, and it seems just plain logic requires that conclusion.

So now we have the testimony of a witness who has seen the original contract, who has had long experience [145] as a lawyer and a specialized experience in the art of drawing and construing contracts. We have his oral testimony, which in my opinion I held was admissible.

Under that testimony I believe that the Govern-

ment has proved that the Olympic Commissary Company was an agency of the United States. Agencies of the United States are necessarily limited in their power to bind the United States. I doubt whether the United States Government can enter into a general agency agreement and give to any individual or corporation the same broad powers as an agent which an individual can, but the courts have recognized for a long time it is possible for the Government to establish individuals or corporations as its agent.

Here we have an agency agreement with the du Pont company, which gave to the du Pont company the right, subject to strict supervision and control, and to the further restriction of approval, before such subagency could be created.

Under this contract a revolving fund was set up. I do not think even the du Pont company or the Olympic Commissary Company would have the broad power of agency under the du Pont contract, as has been explained to us by the witness, or the Olympic Commissary Company contract, to bind the United States Government for every- [146] thing that they might try to do. They certainly have the power to bind the Government in so far as the operation of this business is concerned, and in so far as the funds which were established by the United States for this business by the original contract and the subcontract are concerned.

Suppose I worked at the Olympic Commissary as a cook, and I did not get paid, I certainly would be entitled to start a suit and subject that fund

to the obligation of payment, if the fund was in existence at that time.

The witness has explained about the contract. It is clear that the Olympic Commissary Company received compensation in the form of a fee. It was simply employed at a salary to operate this commissary business, and its salary was paid—not directly but indirectly—by the United States Government. The Government had the right to control it, and had the right to settle disputes between the Commissary company and the du Pont company. It had the right to renegotiate the contract, if it felt that the compensation received by the Olympic Commissary Company was unconscionable. It was subject at all times to the direction and control of the representatives of the Army Engineers, so it contained in its limited scope all the elements of agency. [147]

That brings us to the next question, whether or not there was any intent upon the defendant's part to defraud an agency of the United States.

Every individual is presumed to know the consequences of his acts, and to intend to do those things which he does do. There can be no doubt under the testimony here that when this defendant had these commissary tickets printed in the form they were, and made the use of them he did, that he intended to defraud somebody. He had the intent to defraud.

It is equally clear he had the intention of defrauding the Olympic Commissary Company. Now that is the intent which is necessary. It is not

necessary for him to know that the Olympic Commissary Company was an agency of the United States. The Olympic Commissary Company just happened to be an agency of the United States, and he intended to defraud this concern, which at that time and under those circumstances was an agency of the United States. It seems to me clear he did it with the intent, the clear intent, to defraud this agency of the United States, and as a result of his acts he did defraud, to the extent that the tickets were passed, and he was defrauding the United States.

And so I will find the defendant guilty as charged in the indictment as to each of the three counts.

Mr. Sandvig: Do you want to pass sentence now?

The Court: Yes.

Mr. Sandvig: Your Honor, you have seen fit to find the defendant guilty. I have never known the defendant except in connection with this case. They lived—I guess he was born on the Coast, in the State of Washington. He has never been in trouble at all before. He never has been convicted of anything, and has always conducted himself as a reputable citizen. Whatever he may have done in connection with printing the tickets, I have nothing to say about that. That was wrong. There is no question about that.

The Court: You make that statement, that he has never done anything wrong. Do you want to ask for a presentence investigation in this case?

Mr. Sandvig: Not particularly, because Your Honor——

The Court: Well——

Mr. Sandvig: He never has been convicted.

The Court: But assume you believe that, and assuming it is true, are you asking for probation in this case?

Mr. Sandvig: I would like to get probation. I would like to get it. The very least we can get. He never was in any other trouble, and when he got those tickets, Your Honor will remember it came up in the testimony they arrested him—he was going to join the army then. Whatever bad intention he had formed, he was going into the army. [149]

The Court: I do not want to indicate anything, but if a man never has been convicted of a crime, if he wants a presentence investigation he is entitled to it from the Court. I do not say I will consider probation, but if you want to make an argument for probation, you may do so.

Mr. Sandvig: I would ask for it.

The Court: He is entitled to that as a matter of right. It is not in the statute, but I will give him that right. If you want to ask for that, I will put the matter over for sentence until the next time I come back, which will be on the afternoon of May——

Mr. Sandvig: Are you going back to Montana?

Defendant: Yes.

Mr. Sandvig: You can come back.

The Court: He will have to come back or he

will not go. I will fix it now, and it will be at 2:00 o'clock in the afternoon of May 1; but in the meantime——

Mr. Sandvig: He is still on his original bond.

The Court: Mr. Kurz is here, and you can see him, and you will have to give him a complete statement about your wife and family, and all about yourself, and he will check up on it, and he will give me a complete report on you.

Defendant: Can we do that now?

The Court: Yes. He is out in the hall.

(No further proceedings had.) [150]

[Title of District Court and Cause.]

CERTIFICATE OF TRIAL JUDGE

The above and foregoing cause was tried before the undersigned Lewis B. Schwellenbach, Judge of the United States District Court for the Eastern District of Washington; within thirty (30) days after the date of the judgment, the time for filing, settling, and procuring to be settled and signed the bill of exceptions in said cause was by me extended to June 18, 1945, upon which date the bill of exceptions was served and filed in said cause.

Now, Therefore, I, the Trial Judge aforesaid, do hereby sign, settle, and certify the above and foregoing proposed bill of exceptions filed herein as the bill of exceptions in said cause.

Dated this 25th day of June, 1945.

L. B. SCHWELLENBACH

United States District Judge

Approved and notice waived:

EDWARD M. CONNELLY

United States District Attorney and Attorney for
Plaintiff

Copy of within Record received this 18th day of
June 1945 and due service thereof acknowledged
on said date.

EDWARD M. CONNELLY

U. S. Atty.

HARVEY ERICKSON

Asst. U. S. Attorney,
Attorneys for Appellee.

[Endorsed]: Filed Jun. 25, 1945.

PLAINTIFF'S EXHIBIT "A"

	60	60	60	60	60	60	60	
10	Olympic Commissionery Co.						No. 321350 A	50
10	MEN'S MEAL TICKET							50
10	Good Only at Mess Hall No. 7							50
10	\$12.60 Plus Tax							50
40	Name: RICHARD HAUGEN							50
40	Badge No.: 10-8410						Date: 3-14	50
	60	60	60	60	60	60	60	

[Clerk's Note: The figures with line through them indicate punch out on original ticket.]

PLAINTIFF'S EXHIBIT "A-1"

10-8410	B
Name HAUGEN	Badge No.
MEAL TICKET WAGE DEDUCTION AUTHORIZATION (For Mess Hall No. 7)	
319491	
No. 32135	A 3/14
I hereby acknowledge receipt of meal ticket issued to me by the Olympic Commissary Company, and in consideration of this ticket I hereby authorize my employer to deduct \$12.98 from wages to be earned by me to cover the cost of meals afforded through the use of this ticket.	
R M	R. R. HAUGEN Mar 19 1944
Date	Employee's Signature B H

[Printer's Note: Above tickets over stamped with red fig. 7.]

PLAINTIFF'S EXHIBIT "B"

	60	60	60	60	60	60	60	
10	Olympic Commissary Co.				No. 321350 A			50
10	MEN'S MEAL TICKET							50
10	Good Only at Mess Hall No. 7							50
10	\$12.60 Plus Tax							50
10	Name :.....							50
10	Badge No.....			Date.....				50
	60	60	60	60	60	60	60	

[Clerk's Note: Exhibit B is a cigar box filled with 961 blank tickets of which the above is a sample.]

PLAINTIFF'S EXHIBIT "C"

	60	60	60	60	60	60	60	
10	Olympic Commissary Co.				No. 321350 A			50
10	MEN'S MEAL TICKET							50
10	Good Only at Mess Hall No. 7							50
10	\$12.60 Plus Tax							50
10	Name: A. M. CLARK							50
10	Badge No. 10-7435			Date: 4-23-44				50
	60	60	60	60	60	60	60	

[Clerk's Note: The figures with line through them indicate punch out on original ticket.]

[Printer's Note: Above tickets over stamped with red fig. 7.]

PLAINTIFF'S EXHIBIT "D"

	60	60	60	60	60	60	60	
10	Olympic Commissary Co.				No. 321350 A		50	
10	MEN'S MEAL TICKET						50	
10	Good Only at Mess Hall No. 7						50	
10	\$12.60 Plus Tax						50	
10	Name: J. R. HARVEY						50	
10	Badge No. 10-8340				Date: 4-14-44		50	
	60	60	60	60	60	60	60	

.. [Clerk's Note: The figure with line through it indicates punch out on original ticket.]

PLAINTIFF'S EXHIBIT "E"

	60	60	60	60	60	60	60	
10	Olympic Commissary Co.				No. 321350 A		50	
10	MEN'S MEAL TICKET						50	
10	Good Only at Mess Hall No. 7						50	
10	\$12.60 Plus Tax						50	
10	Name: J. R. HARVEY						50	
10	Badge No. 10-8340				Date: 4-18-44		50	
	60	60	60	60	60	60	60	

[Clerk's Note: The figure with line through it indicates punch out on original ticket.]

[Printer's Note: Above tickets over stamped with red fig. 7.]

PLAINTIFF'S EXHIBIT "F"

(Four tickets as follows)

	60	60	60	60	60	60	60	
10	Olympic Commissary Co.				No. 321350 A			50
10	MEN'S MEAL TICKET							50
10	Good Only at Mess Hall No. 7							50
10	\$12.60 Plus Tax							50
10	Name: J. R. HARVEY							50
10	Badge No. 10-8340				Date: 4-2-44			50
	60	60	60	60	60	60	60	

	60	60	60	60	60	60	60	
10	Olympic Commissary Co.				No. 321350 A			50
10	MEN'S MEAL TICKET							50
10	Good Only at Mess Hall No. 7							50
10	\$12.60 Plus Tax							50
10	Name: A. M. CLARK							50
10	Badge No. 10-7435				Date: 4-23-44			50
	60	60	60	60	60	60	60	

	60	60	60	60	60	60	60	
10	Olympic Commissary Co.				No. 321350 A			50
10	MEN'S MEAL TICKET							50
10	Good Only at Mess Hall No. 7							50
10	\$12.60 Plus Tax							50
10	Name: A. M. CLARK							50
10	Badge No. 10-2345				Date: 4-21-44			50
	60	60	60	60	60	60	60	

[Printer's Note: Above tickets over stamped with red fig. 7.]

Plaintiff's Exhibit "F"—(Continued)

	60	60	60	60	60	60	60	
10	Olympic Commissary Co.							50
10	MEN'S MEAL TICKET							50
10	Good Only at Mess Hall No. 7							50
10	\$12.60 Plus Tax							50
10	Name: R. A. DUNHAM							50
10	Badge No. 10-7531					Date: 4-22-44		50
	60	60	60	60	60	60	60	

[Printer's Note: Above tickets over stamped with red fig. 7.]

PLAINTIFF'S EXHIBIT "G"

5-6-44

Yakima, Wash.

I, Richard Roland Haugen, hereby give this statement voluntarily to C. Erwin Piper, Special Agent of the Federal Bureau of Investigation. No threats, promises, or rewards have been made or offered to me in consideration thereof. I have been advised that, this statement may be used against me in court.

On April 14, 1944 I left Hanford, Wash. by bus en route to Tacoma Wash. driving there on the morning of the 15th. I registered at the Olympic Hotel in Tacoma under the name of Dick Hartley. On that same morning (April 15, 1944) I went to the print shop across the street from the hotel and ordered them to print (1000) one thousand Men's

[R.R.H.]

Meal Tickets for the ~~Olympic Commissar~~—me. The name of the Olympic Commissary Co. was to appear thereon. I gave the print shop a ticket which I had purchased from the Olympic Commissary Co. and asked that this be duplicated. The print shop is located just across Pacific Ave., facing the Olympic Hotel. The price for one thousand of these [R.R.H.] tickets was \$10.95. In order to get them made in a hurry I agreed to pay \$5.00 more for them. On Monday morning, the 17th of April, 1944, the man from the print shop came to the hotel and asked whether I wished to have the numbers on the tickets serialized. I told him to make all of them with the same serial number. I got the tickets (1000) on the afternoon of the 17th and paid the print ship \$16.00 in cash.

On the 17th of April at about 9 P. M. I left Tacoma for Spokane, arriving there on the 18th. I left Spokane on the 19th en route to ~~Han~~ [R. R. H.] Yakima and then to Hanford, Wash. I arrived in Hanford on the evening of April 20, 1944.

From the 21st of April, 1944 until May 1, 1944, I sold these counterfeit meal tickets to other employees at the Hanford Engineering Works. I sold them for \$5.50 apiece. The men to whom I sold them could in turn sell them for whatever they wished. I sold about twenty (20) of the counterfeit tickets, knowing they were counterfeit and that [R. R. H.] [21] it was illegal to sell them. I have
fifty
received approximately ~~one hundred~~ dollars
(\$50.00)
~~(\$100.00)~~ [R.R.H.] from the return of such tickets.

On May 1, 1944, I turned over four (4) of the counterfeit meal tickets to Special Agent Piper. I told him that the balance of the tickets were in my hotel room, room 312 of the Commercial Hotel, Yakima, Wash. and that he could get them there. I think there were about nine hundred eighty (980) of these tickets left in a cigar box in my room.

restitution

I am willing and wish to make ~~retribution~~ to the men to whom I sold the counterfeit tickets.

I have read the above statement consisting of three pages and certify that it is true to the best of my knowledge.

RICHARD R. HAUGEN

LOREN T. COULTER

C. ERWIN PIPER

Special Agent, F. B. I. [22]

PLAINTIFF'S EXHIBIT "Q"

United States of America

War Department

Washington, 9 June, 1944.

I Hereby Certify that the attached War Department Procurement Regulation No. 1, and pages 305, 310 and 310.1 of War Department Procurement Regulation No. 3 are true extracts of Regulations issued by the Commanding General, Headquarters, Army Service Forces, War Department. I further certify that the authorities described in the foregoing extracts are now in full force and

Plaintiff's Exhibit "Q"—(Continued)
effect and have been in full force and effect from
their respective dates.

H. C. KILPATRICK

Major, Corps of Engineers,
JPT

Executive Officer JD

I Hereby Certify that Major H. C. Kilpatrick,
who signed the foregoing certificate, is the Execu-
tive Officer to the Chief of Engineers and that to
his certification as such full faith and credit are
and ought to be given.

In Testimony Whereof I, Henry L. Stimson,
Secretary of War, have hereunto caused the seal
of the War Department to be affixed and my name
to be subscribed by the Assistant Chief Clerk of
the said Department, at the City of Washington,
this 9th day of June, 1944.

[Seal]

HENRY L. STIMSON

Secretary of War.

By J. C. COOK,

Assistant Chief Clerk. [23]

Plaintiff's Exhibit "Q"—(Continued)

4-7-44 (8-13-43)

101 PR 1

PROCUREMENT REGULATION

No. 1

GENERAL INSTRUCTIONS

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GENERAL INSTRUCTIONS

Section I.

INTRODUCTION

- (101) Publication of procurement regulations

Plaintiff's Exhibit "Q"—(Continued)

During the past few years it has been the practice of the War Department to publish procurement regulations in several different publications, viz: Army Regulations, War Department Circulars, etc. It has also been the practice to include in such regulations precise details of how purchases were to be effected. For reasons too obvious to mention, neither practice can be justifiably continued in view of the present war emergency. Accordingly, a new numbered series of procurement regulations has been prepared to replace all other procurement regulations outstanding as of this date. As changes in or additions to this new series of regulations become necessary, the same will be effected by the publication of corrected or supplemental sheets to the appropriate regulation.

(102) Rescission of Army Regulations. The following Army Regulations have been rescinded:

AR 5-5	AR 5-100
AR 5-50	AR 5-140
AR 5-160	AR-5-300
AR 5-200	AR 5-320
AR 5-220	AR 5-340
AR 5-240	AR 5-360
AR 5-260	

(103) Rescission of Procurement Circulars. Effective July 1, 1942, all War Department Procurement Circulars which have not been rescinded heretofore are hereby rescinded. [25]

(103-A) Rescission of "T" Series of Procure-

Plaintiff's Exhibit "Q"—(Continued)
ment Regulations.— The temporary series of Procurement Regulations with numbers followed by "T", heretofore issued, is hereby rescinded.

(104) Rescission of other instructions and directives.— All prior instructions and directives which are inconsistent with instructions contained in these Procurement Regulations, as originally issued under date of July 1, 1942, or as the same shall be amended from time to time, shall be deemed rescinded as of July 1, 1942 or as of the date of any such amendment, as the case may be.

Section II.

DISTRIBUTION OF PROCUREMENT REGULATIONS

(105) Deleted.

(106) Distribution of Procurement Regulations.
All communications pertaining to the distribution of Procurement Regulations including

- (1) requests for complete sets
- (2) requests for increase or decrease in the number of copies of revisions to be furnished;
- (3) requests for copies of particular revisions;
- (4) requests for missing pages or tab cards;
- (5) requests for change of address to which revisions are to be forwarded;

should be sent to Legal Branch, Office, Director of Materiel Headquarters, Army Service Forces, Room 5C 659 The Pentagon, Washington 25, D. C.

Any request which involves any increase or decrease in the number of copies of revisions to be

Plaintiff's Exhibit "Q"—(Continued)

furnished should specify not only the new number of copies desired but also the number of copies currently being furnished. In addition, any such request and any request for a change of address should specify the mailing address (as appearing on the envelope or package in which revisions are received) to which revisions currently are being forwarded. [26]

Communications (including requests mentioned in this paragraph 106) pertaining to the distribution of Procurement Regulations may be by letter or memorandum. Such requests need not be in the form of formal requisitions.

Section III.

APPLICABILITY OF REGULATIONS

(107) Authority with respect to procurement.

(107.1) Basic statute. Sec. 897 of the Military Laws (Supp. II, 1942) provides as follows:

“Secretary of War, Under Secretary of War, and Assistant Secretary of War; duties in connection with procurement. Hereafter the Secretary of War, in addition to other duties imposed upon him by law, shall be charged with the supervision of the procurement of all military supplies and other business of the War Department pertaining thereto and the assurance of adequate provision for the mobilization of materiel and industrial organizations essential to wartime needs, and he may assign to the Under Secretary of War and The Assistant Secretary of War such duties in connection there-

Plaintiff's Exhibit "Q"—(Continued)

with as he may deem proper. * * *” Sec. 5a, added to act of June 3, 1916, by sec. 5 act of June 4, 1920 (41 Stat. 761); sec. 2, act of Dec. 16, 1940 (54 Stat. 1224); 10 U.S.C. 1193.

(107.2) Delegations from the Secretary of War to the Under Secretary of War. (1) On April 21, 1941, the Secretary of War issued the following order:

“Pursuant to authority contained in the Act of December 16, 1940 (Public No. 891—76th Congress):

a. The duties and responsibilities placed on the Secretary of War by Section 5a of the National Defense Act, as amended, are hereby assigned to the Under Secretary of War.

b. Chiefs of branches of the Army will report directly to the Under Secretary of War regarding all matters of procurement.

c. The Under Secretary of War will continue to perform the duties and discharge the responsibilities placed on The Assistant Secretary of War by Army Regulations No. 5-5, July 16, 1932, Orders E, War Department, November 28, 1933, and all other existing orders or instructions. [27]

d. The office heretofore designated as the Office of The Assistant Secretary of War will hereafter be designated the Office of the Under Secretary of War. All officers and civilian employees now detailed to the Office of the Under Secretary of War or the Office of The Assistant Secretary of War from the branches engaged in procurement, and all

Plaintiff's Exhibit "Q"—(Continued)

other officers and employees now on duty in the Office of the Under Secretary of War or in the Office of The Assistant Secretary of War, shall continue on such detail and duty in the Office of the Under Secretary of War.

e. During the absence or disability of the Under Secretary of War, or in the event of a temporary vacancy in that office, the duties and responsibilities of the Under Secretary of War shall be performed and discharged by The Assistant Secretary of War, and in the case of the absence or disability of both the Under Secretary of War and The Assistant Secretary of War, or in the event of a temporary vacancy in both of said offices, the duties and responsibilities of the Under Secretary of War shall be performed and discharged by the Assistant Secretary of War for Air."

(2) Under date of December 30, 1941, the Secretary of War issued the following memorandum:

Memorandum for the Under Secretary of War.

Subject: Delegation of Authority under Executive Order No. 9001.

The powers delegated to the War Department by Executive Order No. 9001, dated December 27, 1941, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made, and to make advance, progress, and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts are hereby further delegated to the Under Secretary of War.

Plaintiff's Exhibit "Q"—(Continued)

He may, pursuant to Executive Order No. 9001, exercise such powers either personally or through such officer or officers or civilian officials of the War Department as he may direct, and he may confer upon such officers or civilian officials the power to make further delegations of such powers within the War Department.

/s/ HENRY L. STIMSON

Secretary of War.

(3) War Department Circular 59, issued under date of March 2, 1942, provides in part as follows:

1. The President has approved a reorganization of the War Department and the Army, effective March 9, 1942. Pending the issuance of detailed instructions and changes in regulation, a summary description of the new organization is furnished for the information and guidance of all concerned.

* * * *

e. Supply arms and services and War Department offices and agencies will come under the direct command of the Commanding General, Services of Supply as indicated below:

(1) Those parts of the office of the Under Secretary of War engaged in functions of procurement and industrial mobilization.

* * * *

b. The mission of the Army Air Forces is to procure and maintain equipment peculiar to the Army Air Forces, and to provide air force units properly organized, trained, and equipped for combat operations. Procurement and related functions

Plaintiff's Exhibit "Q"—(Continued)

will be executed under the direction of the Under Secretary of War.

* * * *

7. Services of Supply—a. The duties and responsibilities placed on the Secretary of War by Section 5a of the National Defense Act, as amended shall continue to be performed by the Under Secretary of War. The Director of Production shall continue to perform his present services reporting direct to the Under Secretary of War.

b. The Commanding General, Services of Supply, shall, on procurement and related matters, act under the direction of the Under Secretary of War and shall, on military matters, report to the Chief of Staff. The Commanding General, Services of Supply, is charged in general with the functions, responsibilities, and authorities of command authorized by law, Army Regulations, and custom over individuals and units assigned to the Services of Supply.

c. The mission of the Services of Supply is to provide services and supplies to meet military requirements except those peculiar to the Army Air Forces. Procurement and related functions will be executed under the direction of the Under Secretary of War.

d. The Services of Supply consolidated under the jurisdiction of the Commanding General, Services of Supply, the supply arms and services, [29] certain administrative services of the War Department, certain parts of the office of the Under Secre-

Plaintiff's Exhibit "Q"—(Continued)

tary of War, certain boards and committees, general depots, ports of embarkation and auxiliaries, and corps areas, with such amalgamation, reallocation of duties, and reorganization as is necessary or advisable.

e. The following duties are specifically assigned to the Services of Supply:

(1) The direction and supervision of engineering research, development, procurement, storage, and distribution of supplies and equipment, except those peculiar to the Army Air Forces.

(2) The establishment of purchasing and contractual policies and procedure.

(3) Transportation and traffic control.

(4) Construction for the Army.

(5) The consolidation of programs and requirements of the Army with the programs and requirements received from Defense Aid and the Navy and procured by the Army.

(107.3) Responsibilities of the Under Secretary of War fixed by AR 5-5. Although Army Regulation 5-5 is rescinded, the portion thereof relating to the responsibilities of The Assistant Secretary of War (now the Under Secretary of War) is incorporated by reference in paragraph c. of the above quoted order of the Secretary of War, dated April 21, 1941. The portion of said Regulation which is thus continued in force reads as follows:

* * * *

“b. Definition.—Under section 5a, national defense act, as amended, the Assistant Secretary of

Plaintiff's Exhibit "Q"—(Continued)

War, under the direction of the Secretary of War, is charged, among other duties, with the supervision of all administrative and operative functions and installations of the Military Establishment concerned in the acquisition or production of military supplies. The types of materiel desired having been specified by the proper agencies, the responsibilities of the Assistant Secretary of War, under the statute, begin with the necessary preliminary and preparatory measures for the procurement or production of such materiel, and end with its delivery to the proper supply arms and services for issue. [30]

"c. Supervision over procurement includes preparation of plans and policies and supervision of activities concerning—

(1) Research and development of substitutes for critical and strategic materials and of materials, methods or processes, and facilities for manufacturing purposes.

(2) The procurement of materials and facilities for manufacturing purposes.

(3) Preparation of United States Army manufacturing specifications and the commercial standardization activities of the supply arms and services. See AR 850-25.

(4) Procurement of all military supplies by purchase, production, or other means, whether obtained for experimental, service test, or issue purposes; inspection, test, acceptance, and storage of supplies incident to procurement; the procurement

Plaintiff's Exhibit "Q"—(Continued)

of real estate and the construction, operation, maintenance, repair, and inspection of all establishments and facilities for the foregoing purposes.

(5) Procurement of supplies for other Government departments or for foreign governments at their request.

(6) The acquisition and use of patent rights by the War Department and the Army.

(7) The transfer or exchange of military supplies in conformity with approved policies.

(8) The renovation of materiel on a production basis at an establishment functioning under the direct control of a chief of a supply arm or service in accordance with approved policies and projects.

(9) The collection of information and compilation of data pertaining to sources of supply.

(10) The assurance of adequate and timely provisions for the mobilization of the materiel and industrial organizations essential to war-time needs, including arrangements in the supply arms and services and and arrangements with the agencies outside the War Department.

(11) The Army Industrial College, Washington, D. C.

(12) Instruction in business administration at civilian institutions.

(13) Fiscal matters pertinent to procurement in accordance with instructions contained in paragraph 1b(2) and (4) of orders E, War Department, October 29, 1925. [31]

(14) Legislation relating to procurement.

Plaintiff's Exhibit "Q"—(Continued)

(15) Civilian personnel engaged on procurement duties.

(16) Any other matters pertaining solely to the business activities of the War Department in the procurement of military supplies. The determining factor in all cases will be whether the aspect of the particular activity concerned in the given case is incident to procurement. If it is, the statute places it under the supervision of the Assistant Secretary of War.

"d. The Assistant Secretary of War will represent the War Department—

(1) On all interdepartmental boards for the standardization of—

(a) Specifications

(b) Procurement procedure

(2) On the Army and Navy Munitions Board.

(3) In dealing with any interdepartmental or superdepartmental agency that may be created in connection with the allocation of materiel or industrial facilities to various uses.

(4) In arranging necessary contacts with other standardization bodies such as the American Engineering Standards Committee and the Division of Simplified Practice, Department of Commerce.

(5) On the Patents and Design Board. Sec. 10 (r), act July 2, 1926 (44 Stat. 788; U.S.C. 10:310(r); sec. 2041, M.L., 1929).

(6) On the Advisory Air Coordination Committee.

Plaintiff's Exhibit "Q"—(Continued)

(7) In dealing with any interdepartmental or superdepartmental agency that may be created in connection with aeronautical matters.

"e. Chiefs of supply arms and services will report directly to and will correspond directly with the Assistant Secretary of War on all matters covered above.

"2. Delegated duties.—The following duties are delegated to the Assistant Secretary of War and are classified as follows:

"a. Military

(1) (a) Matters pertaining to the Militia Bureau and the National Guard.

(b) Matters pertaining to the Officers' Reserve Corps and the Organized Reserves.

(c) Clemency cases in mitigation or remission of sentence by courts-martial. [32]

(2) Correspondence on the matters in (1) above will follow the usual military channels.

"b. Nonmilitary.

(1) (a) The sale or disposal of surplus supplies, equipment, plants, land, or other facilities.

(b) Claims, foreign or domestic, by or against the War Department, including those resulting from the operation of aircraft.

(c) The purchase and sale of real estate; the lease of real estate for the use of the War Department; the granting of leases or licenses to individuals, corporations, or organizations for the temporary use of land, buildings, or other property under War Department control; and easements or

Plaintiff's Exhibit "Q"—(Continued)

rights of way across military reservations, in accordance with approved policies.

(d) The activities relating to the National Board for the Promotion of Rifle Practice and to civilian marksmanship.

(e) Approval of expenditures from funds allotted, and of public vouchers for expenditures by the disbursing clerk of the War Department; approval of the program of expenditures by the National Board for the Promotion of Rifle Practice; routine expenditures from the appropriation "Contingencies of the Army"; and expenditures from "Contingencies, Military Information Division," for extraordinary expenses of military attaches and observers abroad.

(f) Matters relating to national military parks and national monuments.

(g) Matters relating to national cemeteries in the United States and abroad.

(h) Authorization of advertising.

(i) Regulations for burial expenses of deceased military personnel (AR 30-1830).

(j) The use of patent rights by the War Department and the Army.

(k) Bridge permits and extensions of time for completion of bridges.

(l) Disposition of engineer property pertaining to rivers and harbors.

(m) Permits for laying submarine cable.

(2) Correspondence on the matters in (1) above will be direct [33] between the office of the Assist-

Plaintiff's Exhibit "Q"—(Continued) .
ant Secretary of War and the agency or office concerned unless otherwise directed."

(107.4) Orders, Directives, Regulations, and Instructions relating to Procurement Policy, Organization or Procedure.—Under date of 16 September 1943, the Under Secretary of War addressed the following memorandum to the Commanding General, Army Air Forces and the Commanding General, Army Service Forces:

Memorandum For: The Commanding General,
Army Air Forces; The Commanding General,
Army Service Forces.

1. Until otherwise directed, existing orders, directives, re regulations and instructions with reference to procurement policy, organization of procedure, which have heretofore been issued by the Under Secretary of War, or by The Commanding General, Army Service Forces (formerly Services of Supply), or by higher authority, are applicable to the Army Air Forces as well as the Army Service Forces, unless otherwise specifically indicated.

2. Uniformity of policies and procedures in procurement and related matters will be accomplished in so far as practicable. To achieve this objective the following procedure is prescribed:

a. Prior to their issuance, important orders, directives, regulations or instructions affecting major policies on procurement or related matters will be presented to the Under Secretary of War for his approval.

Plaintiff's Exhibit "Q"—(Continued)

b. All other orders, directives, regulations or instructions to carry out approved policies will be processed and issued by the Commanding General, Army Service Forces, without reference to the Under Secretary of War.

c. Orders, directives, regulations and instructions indicated in paragraphs a. and b. above will be issued by the Commanding General, Army Service Forces. They will be applicable to the Army Air Forces unless otherwise specifically indicated. Where so applicable, they shall, prior to their issuance, be cleared in each case with the Commanding General, Army Air Forces, through an Army Air Forces Liaison Officer designated by him. The Director, Purchases Division, Army Service Forces, will be responsible for referring such orders, directives, regulations and instructions to the Army Air Forces Liaison Officer for clearance. If the Army Air Forces disagree with the proposal in so far as it would be applicable to them, the matter will be submitted to the Under Secretary of War for decision.

d. The Commanding General, Army Service Forces, will furnish the [34] Commanding General, Army Air Forces, with such number of copies of said orders, directives, regulations and instructions as the latter desires for redistribution to agencies under his jurisdiction.

3. This memorandum will supersede my communication dated 9 April 1942 to The Commanding General, Materiel Command, Army Air Forces and

Plaintiff's Exhibit "Q"—(Continued)

The Commanding General, Services of Supply, on the same subject. (The superseded memorandum was formerly set forth in this paragraph 107.4).

ROBERT P. PATTERSON,
Under Secretary of War.

(107.5) Delegations from the Under Secretary of War. (1) To the Commanding General, Army Service Forces—Under date of September 15, 1942, the following memorandum was issued by the Under Secretary of War:

Memorandum for the Commanding General,
Services of Supply

Subject: Delegation of Authority.

1. In confirmation of and supplementing the memorandum of the undersigned to the Commanding General, Services of Supply dated June 29, 1942 on the above subject, authority is hereby delegated to the Commanding General, Services of Supply, to act for the Secretary of War or the Under Secretary of War in clearing, approving, and taking other action in respect to contracts, change orders, supplemental agreements, advance payments, awards, letters of intent, letter contracts, letter purchase orders, leases, amendments of contracts and other contractual instruments; to make, authorize and approve sales or contracts for the sale of equipment, supplies and material; to prescribe and modify regulations in respect of procurement; and to approve new War Department contract forms

Plaintiff's Exhibit "Q"—(Continued)

and deviations from approved forms of contracts, including all authority heretofore delegated to the undersigned by the Secretary of War pursuant to Public Law 354, 77th Congress and Executive Order 9001.

2. Without any limitation of the powers and authority hereinbefore granted, there is hereby vested in the Commanding General, Services of Supply, pursuant to and subject to the provisions of Title II of the First War Powers Act (Public Law 354, 77th Congress) and Executive Order 9001 the authority to take the following action:

a. He may enter into, amend or modify contracts, may make purchases, may place orders, and make advance progress and other payments [35] on such contracts, purchases and orders without regard to the provisions of law relating to the making, performance, amendment or modification of contracts.

b. The contracts hereby authorized to be made include agreements of all kinds (whether in the form of letters of intent, purchase orders, or otherwise) for all types and kinds of things and services necessary, appropriate or convenient for the prosecution of war, or for the invention, development or production of, or research concerning any such things, including but not limited to, aircraft, buildings, vessels, arms, armament, equipment, or supplies of any kind, or any portion thereof, including plans, spare parts and equipment therefor, materials, supplies, facilities, utilities, machinery, machine tools and any other equipment, without any

Plaintiff's Exhibit "Q"—(Continued)

restruction of any kind, either as to type, character, location or form.

c. Whenever, in the judgment of the Commanding General, Services of Supply (or of an officer or civilian employee of the War Department to whom authority has been delegated to exercise such powers), the prosecution of the war is thereby facilitated, he may amend or modify contracts heretofore or hereafter made for the purpose of (1) obtaining continued operations by contractors engaged in war production, (2) encouraging greater diligence on the part of contractors, (3) protecting contractors from the consequences of unforeseen or unexpected events, (4) adjusting contracts to new conditions and circumstances, including those created by the rules, orders, instructions and determinations of Government departments, or (5) for any other purposes for facilitating the prosecution of the war.

Such amendments and modifications of contracts may be without consideration, other than the determination that the prosecution of the war will thereby be facilitated, and may be utilized to accomplish the same things as any original contract could accomplish, irrespective of the time or circumstances of the making of or the form of the contract amended or modified, or of the amending or modifying contract, and irrespective of rights which may have accrued under the contract or the amendments or modifications thereof. The powers hereby delegated may be exercised by (1) supple-

Plaintiff's Exhibit "Q"—(Continued)

mental agreements which modify or amend or settle claims by or against the United States arising under or with respect to any contracts heretofore or hereafter made; (2) agreements with contractors or obligors modifying or releasing accrued obligations of any sort, including accrued liquidated [36] damages or liability under any surety or other bond; or (3) supplemental agreements and change orders suspending or modifying the operation of existing contracts as yet uncompleted, and providing for the payment by the Government of the damages incurred by a contractor by reason of such suspension or modification; provided in each instance that full performance by the contractor under such contract, or under a series of contracts between the United States and the same contractor for substantially the same goods, shall not have been completed and final payment made thereunder. The supplemental contracts hereby authorized to be made include agreements of all kinds for all types and kinds of things and services necessary, appropriate or convenient for the prosecution of the war, or for the invention, development or production of, or research concerning any such things.

d. He may waive bid, payment, performance, or other bonds, and dispense with advertising for bids and competitive bidding.

3. Nothing herein shall affect the existing authority of the Commanding General, Services of Supply, as to matters relating to the Army Air Forces, the extent of which is set forth in the letter

Plaintiff's Exhibit "Q"—(Continued)

of April 9, 1942, from the Under Secretary of War to the Commanding General, Materiel Command, Army Air Forces, and to the Commanding General, Services of Supply, or any authority in respect of Army Air Force contracts and other contractual instruments, delegated to Colonel Albert J. Browning, A.U.S., by memoranda of the undersigned dated June 1, 1942, and September 15, 1942, nor shall anything herein contained be construed to limit or affect the power and authority of any commander in any theatre of operation.

4. The Commanding General, Services of Supply, or any person acting by delegation from him in the exercise of the powers hereby granted, shall have power to ratify and approve any contractual documents entered into or action taken by others, which he himself might have entered into or taken by virtue of the powers hereby granted.

5. The powers, authority and discretion hereby conferred upon the Commanding General, Services of Supply, or any portion or portions thereof, may be redelegated by him to whomsoever he may designate, including without limitation the Director, Purchases Division, Services of Supply, with the power of redelegating such powers, in whole or in part, to any officer or officers or civilian official or officials of the War Department. In any [37] delegation of power or authority hereunder there may be included such terms and conditions, if any, as the person making such delegation may deem appropriate to ensure proper exercise of such power and authority

Plaintiff's Exhibit "Q"—(Continued)

in the interest of the United States and of the prosecution of the war.

/s/ ROBERT P. PATTERSON,
Under Secretary of War.

The memorandum of the Under Secretary of War, dated June 29, 1942, referred to in above memorandum reads as follows:

Memorandum for the Commanding General,
Services of Supply

Subject: Delegation of Authority.

1. Authority is hereby delegated to the Commanding General, Services of Supply, to act for the Secretary of War or the Under Secretary of War in clearing, approving, and taking other action in respect to contracts, change orders, supplemental agreements, advance payments, awards, letters of intent, letter contracts, letter purchase orders, leases, amendments of contracts, and other contractual instruments; to approve sales of equipment, supplies and material; and to approve new War Department contract forms and deviations from approved forms of contracts, including all authority heretofore delegated to the undersigned by the Secretary of War pursuant to Public Law 354, 77th Congress and Executive Order No. 9001.

2. The Commanding General, Services of Supply, is authorized further to delegate the above powers or any portion thereof to whomsoever he may designate, with the power of redelegation.

3. The following memoranda are each hereby

Plaintiff's Exhibit "Q"—(Continued)

revoked; viz: (1) Memorandum for Mr. Albert J. Browning, dated March 13, 1942, delegating certain authority to the Chief of the Purchase Branch, Procurement and Distribution Division, Services of Supply, and (2) Memorandum for Colonel Albert J. Browning, A.U.S., dated June 2, 1942, delegating certain authority to him, as Chief of the Purchases Branch, Procurement and Distribution Division, Services of Supply. Nothing herein contained shall be construed as revoking the delegation of authority to Chiefs of Supply Services contained in Procurement Circular No. 91, dated December 29, 1941, and Procurement Circular No. 17, dated February 24, 1942, nor any delegation of authority heretofore made by the Commanding General, Services of Supply, or the Chief, Purchases Branch, Procurement and Distribution Division.

4. Nothing herein shall affect the existing authority of the Commanding General, Services of Supply, as to matters relating to the Army [38] Air Forces, the extent of which is set forth in the letter of April 9, 1942, from the Under Secretary of War to the Commanding General, Materiel Command, Army Air Forces and to the Commanding General, Services of Supply, or any authority in respect of Army Air Force contracts and other contractual instruments, delegated to Colonel Albert J. Browning, A.U.S. by memorandum of the undersigned, dated June 1, 1942.

/s/ ROBERT P. PATTERSON

Under Secretary of War.

Plaintiff's Exhibit "Q"—(Continued)

(2) To the Chief of Staff—Under date of January 11, 1943, the following memorandum was issued by the Under Secretary of War:

Memorandum for The Chief of Staff:

1. There is hereby delegated to the Chief of Staff full power, in connection with operations subject to his direction and control, to exercise any of the authority and powers pursuant to Executive Order No. 9001 delegated to the undersigned by the Secretary of War by instrument dated December 30, 1941 (see Procurement Regulations, paragraph 107.2). The Chief of Staff may, pursuant to Executive Order No. 9001, exercise such powers either personally or through such officer or officers or civilian officials of the War Department as he may direct and he may confer upon such officers or civilian officials the power to make further delegations of such powers within the War Department.

2. All action heretofore taken by the Chief of Staff or by the direction of the Chief of Staff, that would by this delegation be authorized, is hereby ratified and confirmed. There is hereby expressly conferred upon the Chief of Staff the power and authority to ratify and confirm any action heretofore taken by any person responsible directly or indirectly to the Chief of Staff that would by this delegation of authority be authorized.

Dated this 11th day of January, 1943.

/s/ ROBERT P. PATTERSON

Under Secretary of War.

Plaintiff's Exhibit "Q"—(Continued)

(107.6) Delegations from the Commanding General, Services of Supply to the Director, Purchases Division.—Under date of September 16, 1942, the following memorandum was issued by the Commanding General, Services of Supply: [39]

Memorandum For: Director, Purchases Division.

Subject: Delegation of Authority.

In confirmation of and supplementing the memorandum of the undersigned, dated June 29, 1942, to the Chief, Purchases Branch, Procurement and Distribution Division, Services of Supply (now the Director, Purchases Division, Services of Supply), the authority delegated to the Commanding General, Services of Supply, by memorandum of the Under Secretary of War, dated September 15, 1942 to act for the Secretary of War or the Under Secretary of War in clearing, approving, and taking other action in respect to contracts, change orders, supplemental agreements, advance payments, awards, letters of intent, letter contracts, letter purchase orders, leases, amendments of contracts and other contractual instruments, to make, authorize and approve sales or contracts for the sale of equipment, supplies and material and to approve War Department contract forms and deviations from approved forms, including all authority heretofore delegated to the undersigned pursuant to Public Law 354, 77th Congress, and Executive Order 9001 (including without limitation all authority pursuant to Public Law 354 and Executive Order 9001 delegated to the undersigned by the Under Secre-

Plaintiff's Exhibit "Q"—(Continued)

tary of War by the memorandum dated September 15, 1942), is hereby delegated to the Director, Purchases Division, Services of Supply. The Director, Purchases Division, is authorized to delegate further the above powers, authority, and discretions or any portion thereof to any officer or officers, or civilian official or officials of the War Department he may designate, with the power of redelegation. In any delegation of power or authority hereunder there may be included such terms and conditions, if any, as the person making such delegation may deem appropriate to ensure proper exercise of such power and authority in the interest of the United States and of the prosecution of the War.

/s/ BREHON SOMERVELL

Lieutenant General
Commanding

The memorandum of the Commanding General dated June 29, 1942, referred to in the above memorandum reads as follows:

Memorandum For: Chief, Purchases Branch,
Procurement and Distribution Division.

Subject: Delegation of Authority.

The authority delegated to the Commanding General, Services of [40] Supply, by memorandum of the Under Secretary of War, dated June 29, 1942, to act for the Secretary of War or the Under Secretary of War in clearing, approving, and taking other action in respect to contracts, change orders, supplemental agreements, advance payments,

Plaintiff's Exhibit "Q"—(Continued)

awards, letters of intent, letter contracts, letter purchase orders, leases, amendments of contracts and other contractual instruments, to approve sales of equipment, supplies and material and to approve War Department contract forms, and deviations from approved forms including all authority heretofore delegated to the undersigned pursuant to Public Law 354, 77th Congress, and Executive Order 9001, is hereby delegated to the Chief, Purchases Branch, Procurement and Distribution Division, Services of Supply. The Chief, Purchases Branch, Procurement and Distribution Division, is authorized to delegate further the above powers or any portion thereof to whomsoever he may designate, with the power of redelegation.

/s/ BREHON SOMERVELL

Lieutenant General

Commanding

(107.7) Delegations from the Under Secretary of War to the Special Representative of the Under Secretary of War for the Army Air Forces.—Under date of September 15, 1942, the following memorandum was issued by the Under Secretary of War:

Memorandum For: Colonel Albert J. Browning, A.U.S., Special Representative of the Under Secretary of War.

Subject: Delegation of Authority.

1. In confirmation of and supplementing the memorandum of the undersigned to Colonel Albert

Plaintiff's Exhibit "Q"—(Continued)

J. Browning, A.U.S., dated June 1, 1942, on the above subject, authority is hereby delegated to Colonel Browning to act for the Secretary of War or the Under Secretary of War, in clearing, approving, and taking other action in respect to Army Air Force contracts, change orders, supplemental agreements, advance payments, awards, letters of intent, letter contracts, letter purchase orders, leases, amendments of contracts, and other contractual instruments; to make, authorize and approve sales or contracts for the sale of Army Air Force equipment, supplies and material; and to approve new War Department Army Air Force contract forms and deviations from approved forms of contracts, including all authority with respect to Army Air Force contracts and agreements of all kinds heretofore delegated to the undersigned by the Secretary of War pursuant to Public Law 354, 77th Congress and Executive Order No. 9001. This [41] memorandum, however, shall not affect the existing authority of the Commanding General, Services of Supply, as to matters relating to Air Forces, the extent of which is set forth in the letter dated April 9, 1942 from the Under Secretary of War to the Commanding General, Materiel Command, Army Air Forces, and to the Commanding General, Services of Supply. Colonel Browning, and any person or persons designated by him as such, acting under the authority herein contained will act as "Special Representative of the Under Secretary of War."

Plaintiff's Exhibit "Q"—(Continued)

2. Without any limitation of the powers and authority hereinbefore granted, there is hereby vested in Colonel Browning, pursuant to and subject to the provisions of Title II of the First War Powers Act (Public Law 354, 77th Congress) and Executive Order No. 9001 the authority to take the following action:

a. He may enter into, amend or modify contracts, may make purchases, may place orders, and may make advance progress and other payments on such contracts, purchases and orders without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts.

b. The contracts hereby authorized to be made include agreements of all kinds (whether in the form of letters of intent, purchase orders, or otherwise) for all types and kinds of things and services necessary, appropriate or convenient for the prosecution of war, or for the invention, development, or production of, or research concerning any such things, including but not limited to, aircraft, buildings, vessels, arms, armament, equipment, or supplies of any kind, or any portion thereof, including plans, spare parts and equipment therefor, materials, supplies, facilities, utilities machinery, machine tools, and any other equipment, without any restriction of any kind, either as to type, character, location or form.

c. Whenever, in the judgment of Colonel Browning, (or of an officer or civilian employee of the War Department to whom authority has been dele-

Plaintiff's Exhibit "Q"—(Continued)

gated to exercise such powers), the prosecution of the war is thereby facilitated, he may amend or modify contracts heretofore or hereafter made for the purpose of (a) obtaining continued operations by contractors engaged in war production, (b) encouraging greater diligence on the part of contractors, (c) protecting contractors from the consequences of unforeseen or unexpected events, (d) adjusting contracts to new conditions and circumstances, including [42] those created by the rules, orders, instructions and determinations of Government departments, or (e) for any other purposes for facilitating the prosecution of the war.

Such amendments and modifications of contracts may be without consideration, other than the determination that the prosecution of the war will thereby be facilitated, and may be utilized to accomplish the same things as any original contract could accomplish, irrespective of the time or circumstances of the making of or the form of the contract amended or modified, or of the amending or modifying contract, and irrespective of rights which may have accrued under the contract or the amendments or modifications thereof. The powers hereby delegated may be exercised by (a) supplemental agreements which modify or amend or settle claims by or against the United States arising under or with respect to any contracts heretofore or hereafter made; (b) agreements with contractors or obligors modifying or releasing accrued obligations of any sort, including accrued liquidated damages or lia-

Plaintiff's Exhibit "Q"—(Continued)

bility under any surety or other bond; or (c) supplemental agreements and change orders suspending or modifying the operation of existing contracts as yet uncompleted, and providing for the payment by the Government of the damages incurred by a contractor by reason of such suspension or modification; provided in each instance that full performance by the contractor under such contract, or under a series of contracts between the United States and the same contractor for substantially the same goods, shall not have been completed and final payment made thereunder. The supplemental contracts hereby authorized to be made include agreements of all kinds for all types and kinds of things and services necessary, appropriate or convenient for the prosecution of the war, or for the invention, development or production of, or research concerning any such things.

d. He may waive bid, payment, performance, or other bonds, and dispense with advertising for bids and competitive bidding.

4. Colonel Browning, or any person acting by delegation from him in the exercise of the powers hereby granted, shall have power to ratify and approve any contractual documents entered into or action taken by others, which he himself might have entered into or taken by virtue of the powers hereby granted.

5. The powers, authority and discretion hereby conferred upon Colonel Browning, or any portion or portions thereof, may be redelegated by him to

Plaintiff's Exhibit "Q"—(Continued)

whomsoever he may designate, with the power of re delegating such powers, [43] in whole or in part, to any officer or officers or civilian official or officials of the War Department. In any delegation of power or authority hereunder there may be included such terms and conditions, if any, as the person making such delegation may deem appropriate to ensure proper exercise of such power and authority in the interest of the United States and of the prosecution of the war.

/s/ ROBERT P. PATTERSON

Under Secretary of War

The memorandum of the Under Secretary of War, dated June 1, 1942, referred to in the above memorandum, reads as follows:

Memorandum For: Colonel Albert J. Browning, A.U.S.

Authority is hereby delegated to Colonel Albert J. Browning, A.U.S. to act for the Secretary of War and/or the Under Secretary of War in clearing, approving and taking other action in respect to Army Air Force contracts, change orders, supplemental agreements, advance payments, awards, letters of intent, letter contracts, letter purchase orders, leases, amendments of contracts and other contractual instruments; to approve sales of Army Air Force equipment, supplies and materials; and to approve new War Department Army Air Force contract forms and deviations from approved forms of Army Air Force contracts.

Plaintiff's Exhibit "Q"—(Continued)

The foregoing authority, or any portion thereof, is likewise delegated to such person or persons as may be designated in writing by Colonel Albert J. Browning, A.U.S.

The individual acting under the foregoing authority will so act as "Special Representative of the Under Secretary of War."

The foregoing authority shall remain in full force and effect until revoked by this office.

By direction of the Secretary of War:

/s/ ROBERT S. PATTERSON

Under Secretary of War

(107.8) Delegation of authority to Legal Assistant to Director of Materiel and to Chief, Legal Branch to approve contract forms.—Under date of 12 November 1943 the following memorandum was issued:

Memorandum For: Legal Assistant to the Director of Materiel and to the Chief, Legal Branch, Director of Materiel.

Subject: Delegation of Authority to Approve Contract Forms and Deviations from Approved Forms. [44]

The authority delegated to the Director, Purchases Division, by the Commanding General, Services of Supply, dated September 15, 1942 and the authority delegated to me by the Under Secretary of War, dated September 15, 1942 (in respect of matters relating to the Army Air Forces) to act for the Secretary of War or the Under Secretary

Plaintiff's Exhibit "Q"—(Continued)

of War in approving War Department contract forms and deviations from approved forms is hereby further delegated to the Legal Assistant to the Director of Materiel, and to the Chief, Legal Branch, Director of Materiel, Army Service Forces, or either of them, and to any person who for the time being may be acting in either capacity.

ALBERT J. BROWNING

Brigadier General, General
Staff Corps, Director, Pur-
chases Division.

(107.9) Authority delegated by these Procurement Regulations. These regulations to the extent, and only to the extent, that they actually confer authority upon the chiefs of the technical services and other officers or civilian officials of the War Department to exercise power to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make advance, progress and other payments thereon shall constitute a redelegation by the Commanding General, Army Service Forces of the authority delegated to him as set forth in paragraph 107.5, and by the Special Representative of the Under Secretary of War of the authority delegated to him, as set forth in paragraph 107.7. The authority granted as provided in the preceding sentence, of course, does not dispense with the necessity of obtaining any approval expressly specified in any paragraph of these procurement regulations (see e.g. para-

Plaintiff's Exhibit "Q"—(Continued)

graph 315.1). Authority conferred upon the chiefs of the technical services under any paragraph of these procurement regulations may be redelegated (with or without power of further redelegation) to such officer or officers or civilian official or officials as the chiefs of the technical services severally may direct, whether or not express mention of the powers of redelegation is made in any such paragraph, unless it is expressly provided in the paragraph that the power shall not be redelegated. The exercise prior to the date of these regulations of any such authority by any such officer or officers or civilian official or officials is hereby ratified and confirmed in all respects. [45]

(107.10) Since the regulations are generally declaratory of policy only, it will be necessary for the chief of each technical service to publish appropriate instructions on procedure.

(108) Applicability of these procurement regulations.

(108.1) Preliminary definitions.—(1) The term "procurement activities" as used in paragraph 108.2, includes all such activities except the acquisition and disposal of real estate so far as the latter are governed and regulated by AR 100-60, 100-61, 100-62 and 100-63. The term comprises, but is not necessarily limited to, the procurement of supplies, material and equipment and the procurement of construction work, including that on rivers and harbors.

Plaintiff's Exhibit "Q"—(Continued)

(2) The term "Army agencies", as used in paragraph 108.2, includes all personnel of the Army, except as indicated in paragraph 108.6. In particular, it includes the agencies referred to in paragraphs 108.4 and 108.5.

(3) The term "Appropriated funds", as used in paragraph 108.2, comprises all such funds, including such funds allocated to, as distinguished from appropriated to, the War Department; but does not include organizational, unit or similar funds.

(108.2) These procurement regulations are applicable to all procurement activities carried on by Army agencies with appropriated funds. If a project involves both a procurement activity and acquisition or disposal of real estate governed and regulated by the Army Regulations referred to in paragraph 108.1, these Procurement Regulations are applicable so far as the procurement activity is concerned and are inapplicable so far as the acquisition or disposal of real estate is concerned.

(108.3) Technical services and supply services.—Pursuant to Circular No. 30, Headquarters Army Service Forces, 15 May 1943, the designation of "supply services" is changed to "technical services". This change is being made in the Procurement Regulations as occasion arises to reprint pages for other reasons. In the meantime, the term "supply services" should be read as "technical services". [46]

Plaintiff's Exhibit "Q"—(Continued)

(108.4) Army Air Forces.—(1) The regulations have been issued with the approval of the Army Air Forces, and shall, unless otherwise specifically indicated, apply to the Army Air Forces.

(2) Whenever used herein, unless otherwise specifically indicated, the term "technical services" shall be deemed to include the Army Air Forces, and the term "chiefs of the technical services" shall be deemed to include the Commanding General, Army Air Forces. Likewise, the terms "Director, Purchases Division, Headquarters, Army Service Forces" and "Director, Readjustment Division, Headquarters, Army Service Forces", when used in connection with action to be taken in respect of the Army Air Forces, shall, unless otherwise specifically indicated, be deemed to refer to the Special Representative of the Under Secretary of War designated for that purpose.

(3) Except as specifically otherwise provided, all communications to the Army Air Forces or to the Commanding General, Army Air Forces, relating to procurement, should be addressed to the attention of the Procurement Branch, Materiel Division, Office of the Assistant Chief of Air Staff, Materiel, Maintenance and Distribution.

(108.5) Service Commands. These regulations are applicable to the procurement activities of the service commands. Where procurement is accomplished by a service command at the direction of the chief of a technical service or his duly authorized representative, the directions will contain

Plaintiff's Exhibit "Q"—(Continued)

references to the applicable paragraphs of the Procurement Regulations and will also contain supplementary instructions where appropriate. In such a case, for the purposes of these regulations, the procurement shall be regarded as procurement by the technical service concerned and the contract will be regarded as a contract of that technical service. In all other cases, the service command accomplishing the procurement shall act independently of any technical service and the term "technical service" and the term "service", as used in these regulations, shall be deemed to refer to the service commands and the term "chiefs of technical services" and "chiefs of services" shall be deemed to refer to the Commanding Generals of the Service Commands. In connection with this paragraph see paragraph 108.3 above.

(108.6) Procurement and contracting authority of commanding officers outside continental United States. In general, Commanding Officers in charge of [47] United States armed forces outside the continental United States and its territories and possessions including Alaska are not required, in connection with the procurement of supplies necessary to accomplish the mission confided in them, to comply with the procurement regulations or any other regulations, circulars or instructions or with any provisions or restrictions of the laws of the United States which may be applicable within the United States or any territory or possession thereof. This matter is more fully treated in Section 1 of the

Plaintiff's Exhibit "Q"—(Continued)

Circular No. 21, War Department, 1943. Likewise, Commanding Officers in charge of United States Armed Forces outside the continental United States but within the territories or possessions of the United States including Alaska, who are responsible directly to the War Department (that is the chief of staff), in connection with the procurement of supplies necessary to the accomplishment of the mission confided in them are authorized to disregard procurement regulations and other War Department regulations, restrictions, circulars and instructions, and when they find that to do so will facilitate the prosecution of the war, they are authorized to disregard the provisions of law relating to procurement; all subject however to (1) Title II of the First War Powers Act, 1941, (2) the restrictive provisions contained in Executive Order No. 9001 and (3) any law approved after December 18, 1941. This matter is more fully set forth in Section II of Circular No. 21, War Department, 1943.

(108.7) Procurement within the United States for armed forces abroad.—It is to be noted that the provisions of Circular No. 21, War Department, 1943, referred to in paragraph 108.6 have no application to procurement within the United States for armed forces abroad.

Section IV.

MISCELLANEOUS PROHIBITIONS

(109) Prohibition against voluntary service.

(109.1) No department or officer of the Government may accept voluntary service for the Government except in cases of sudden emergency involving the loss of human life or the destruction of property, or when a written statement is obtained that the service rendered will not be made the basis of a future claim against the Government for compensation. [48]

(110) Prohibition against use of troop labor.

(110.1) Except in cases of manifest necessity or when authorized by the Secretary of War, the labor of troops will not be used to enable the contractors to fulfill contracts.

(110.2) Whenever troop labor has been used—

(1) Authority therefor will be given in writing.

(2) A report enumerating in detail the service rendered will be forwarded to the Commanding General, Army Service Forces, Attention of Industrial Personnel Division.

(3) Full deduction will be made for the value of the service rendered.

(111) Conflicts between outside interests of officers or civilian employees and their official duties.

(111.1) Basis statute.—Section 41 of the United States Criminal Code (18 U.S.C. 93) provides as follows:

Plaintiff's Exhibit "Q"—(Continued)

"No officer or agent of any corporation, joint-stock company, or association, and no member or agent of any firm, or person directly or indirectly interested in the pecuniary profits or contracts of such corporation, joint-stock company, association, or firm, shall be employed or shall act as an officer or agent of the United States for the transaction of business with such corporation, joint-stock company, association, or firm. Whoever shall violate the provisions of this section shall be fined not more than \$2,000 and imprisoned not more than two years."

(111.2) Construction of basic statute.—The general language of Section 41 of the United States Criminal Code has been the subject of interpretation from time to time by The Judge Advocate General and by the Attorney General. The Judge Advocate General has been careful to point out that the question of construction presented "involves the construction and application of criminal statutes concerning which the Federal courts alone can speak with final authority." However, the substance of certain of those opinions is set forth as an aid in the construction of the statute:

(1) In Vol. 40, Op. No. 42, March 31, 1942, the Attorney General rendered an opinion concerning the use of a certain Army officer as a Liaison officer between a corporation and the War Department. It appeared [49] that the officer was also an officer and stockholder in the corporation. In holding that the basic statute would be violated if the officer

Plaintiff's Exhibit "Q"—(Continued)

acted in that capacity, the Attorney General stated in part:

"No man can serve two masters. The statute in question is clearly grounded on this assumption. Its manifest purpose is such that any attempt to reconcile it with the proposed employment runs into difficulties. Some of these difficulties are pointed out by The Judge Advocate General of the Army in his opinion on the question. Others are equally apparent.

"No matter how high are the motives of the Army Officer who advises, he is likely as a realistic matter to be consciously or unconsciously influenced by the fact that his actions may benefit the corporation of which he is an officer and a stockholder. To a degree his salary as an officer of the corporation would be affected by whether his advice leads the War Department to enter into a procurement contract with his company. To a larger degree his share in the earnings of the corporation as a stockholder would be affected by his advice."

(2) In two recent opinions (SPJGA 210.4 and SPJGA 250.7) rendered respectively on May 22, 1942 and March 28, 1942 The Judge Advocate General concluded that a person holding stock in a corporation may be a "person directly or indirectly interested in the pecuniary costs or contracts of such corporation", within the meaning of the statute. It is to be emphasized, however, that these two opinions relate solely to that issue and do not

Plaintiff's Exhibit "Q"—(Continued)

constitute opinions on what constitutes the "trans-
action of business" with the corporation within the
meaning of the statute. The construction of these
words, as contained in the statute, was the subject
of an opinion discussed in subparagraph (3) below.

(3) Under date of December 3, 1942 (SPJGA
1942/5072) the opinion of The Judge Advocate
General was requested with respect to the employ-
ment of a person as head of an agency which would
have complete charge of all phases of production
of certain items which were purchased by the War
and Navy Departments. The prospective head of
the agency had been for some years an officer of
a corporation which was one of the largest pro-
ducers of the items with which the agency would
be concerned, but at the time of the opinion was on
leave of absence without pay. It appeared, how-
ever, that under a retirement system established by
the corporation he would, if he lived to a specified
age, become entitled to certain annual payments.
[50] It further appeared that there was an under-
standing that if the agency were called upon to
transact business with the corporation in question,
such transactions would be conducted by other
officers or employees of the agency and that if
questions were presented not capable of final de-
cision by such other officers or employees, such
questions would be referred to higher authority for
decision. However, it also appeared that the head
of the agency would be called upon to determine
questions of general policy which would affect the

Plaintiff's Exhibit "Q"—(Continued)

corporation of which he was formerly an officer along with other producers. The Judge Advocate General concluded that Section 41 of the Criminal Code would not be violated by the employment of such an individual as head of the agency.

(4) In an opinion dated February 3, 1923, the Acting Judge Advocate General throws further light on what constitutes transacting business within the meaning of Section 41 of the Criminal Code. He had been requested to review the law in relation to the interest of the agents or officers of the United States in contracts with the United States with a view to the submission of proposed amendments thereto so as to permit the utilization of leading men in industry in an advisory capacity in connection with the planning and supervision of the procurement of war necessities. The opinion in part reads as follows:

"The statute is to be strictly construed and criminality attaches only when an individual, being an officer, or member of a business concern or directly or indirectly interested in the profits of the concern is employed or acts as agent of the United States for the transaction of business with that concern. The Act contemplates the actual transaction of business. The negotiation of a tentative contract by an agent of the Government with a business concern in which that agent is an officer, member, or in which he is interested, although not binding upon either party until executed, in accordance with

Plaintiff's Exhibit "Q"—(Continued)

statutory authority and an appropriation sufficient for the fulfillment thereof, would probably be considered a violation of the statute if the performance of the contract was thereafter entered upon. For this reason, in the preparation of procurement plans, no person should be permitted to have a part as agent for the United States in the negotiation of tentative contracts with a concern of which he is an officer, agent or member, or in which he is pecuniarily interested. * * * it is considered that acting in a solely advisory capacity without actual par- [51] ticipation in the negotiation or awarding of a contract or directing the awarding of a contract would not be a violation of Section 41 of the Federal Criminal Code."

(111.3) Regulations supplementary to basic statute.—The following regulations supplementary to the statute set forth in paragraph 111.1 are prescribed:

(1) No officer or employee of the War Department may act as an agent of the United States in advising, recommending, making or approving the purchase of supplies or other property, or in contracting therefor, if he would be admitted to share or receive directly or indirectly any pecuniary profit or benefit from such purchase or contract.

(2) No officer or civilian employee of the War Department shall be in direct charge of the negotiation of, or exercise authority for the final approval of, any contract with any corporation, joint-stock company, association or firm, if at any

Plaintiff's Exhibit "Q"—(Continued)

time during the period subsequent to December 7, 1936 such officer or civilian employee was employed by or engaged in a course of substantial non-Governmental business dealings with such corporation, joint-stock company, association or firm.

The Under Secretary of War is authorized to make exceptions to the regulation contained in subparagraph (2) above. In cases where the chief of a supply service feels that the application of the regulations contained in such subparagraph is impracticable, he should forward to the Director, Purchases Division, Headquarters, Army Service Forces, a request for an exemption. Such request should be accompanied by a full statement of the circumstances which are believed to make such exemption necessary. No exemption may be made from the provisions of the statute referred to in paragraph 111.1 or from subparagraph (1) of this paragraph.

Section V.

PROPOSALS FOR LEGISLATIVE ACTION
AND FOR EXECUTIVE ORDERS AFFECTING
PROCUREMENT

(113) General.—By Circular No. 59, War Department, 1942, the Legislative and Liaison Division, War Department, is charged with supervising the preparation of legislation requested by the War Department, with preparing reports to Committees of Congress and with the maintenance of liaison [52] necessary thereto. Said Circular No. 59

Plaintiff's Exhibit "Q"—(Continued)

further provides that the preparation of reports on legislation affecting the Army Ground Forces, the Army Air Forces or the Army Service Forces may be assigned to the command concerned.

(114) Legislation includes Executive Orders.—The terms "legislation" and "legislative", as hereinafter used in this Section refer to action taken or to be taken by Congress, other than the enactment of strictly appropriation items, and to all Executive Orders.

(115) Legislative Division, Office of the Under Secretary of War.—With the approval and by the authority of the Under Secretary of War, the Legislative Division, Office of the Under Secretary of War, is designated as the agency charged with the coordination within that Office, the Army Service Forces and the Army Air Forces, of all legislative matters affecting procurement or related functions.

(116) Proposals for Legislative Action affecting Procurement.

(116.1) Except as specifically otherwise provided in paragraph 116.2, all proposals for legislative action affecting procurement or related functions, originating from any source whatsoever, will be referred to the Legislative Division, Officer of the Under Secretary of War, for coordination.

(116.2) All such proposals, other than proposals for Executive Orders, originating from sources outside the Office of the Under Secretary of War, the Army Service Forces or the Army Air Forces, will

Plaintiff's Exhibit "Q"—(Continued)

be referred to the Legal Branch, Purchases Division, Headquarters, Army Service Forces. The Legislative Section of that Branch will promptly review such proposals to determine which are of sufficient importance to the Office of the Under Secretary of War, the Army Service Forces, Army Air Forces, or any of them to warrant further consideration. Such of the proposals as warrant such consideration will be referred directly to the Legislative Division, Office of the Under Secretary of War, for coordination.

(117) Action of Legislative Division.—The Legislative Division, Office of the Under Secretary of War, will, with respect to such proposals originating within the Office of the Under Secretary of War, the Army Service [53] Forces, or the Army Air Forces,—

(1) Take all necessary action to secure the views of those individuals and elements within the Office of the Under Secretary of War, the Army Service Forces and the Army Air Forces, whose responsibilities would be affected by such legislative action.

(2) Refer any questions regarding the form of the proposed legislative action to the Legal Branch, Purchases Division, Headquarters, Army Service Forces, for consideration and report.

(3) Make all necessary arrangements for proper coordination with other Government departments and agencies whose functions would be affected.

(4) If it is determined by proper authority to initiate such legislative action, coordinate the mat-

Plaintiff's Exhibit "Q"—(Continued)
ter with the Legislative and Liaison Division, War Department.

(5) Take any other necessary or appropriate action in connection therewith.

With respect to such proposal originating from sources outside the Office of the Under Secretary of War, the Army Service Forces or the Army Air Forces, Legislative Division, Office of the Under Secretary of War will, upon receipt of such proposals, take the action described in subparagraphs (1), (3) and (5) above.

(118) Congressional Hearings. — Arrangements for appropriate representation from the Office of the Under Secretary of War, the Army Service Forces and the Army Air Forces, at Congressional hearings on legislative proposals affecting procurement or related functions will be made through the Legislative Division, Office of the Under Secretary of War.

(119) Reports on Legislative Proposals.—All requests from official sources, within or without the War Department, for reports on legislative proposals, affecting procurement or related functions will, upon receipt by the Office of the Under Secretary of War, the Army Service Forces or the Army Air Forces, be referred to the Legislative Division, Office of the Under Secretary of War, which will secure reports from the appropriate sources within the aforesaid elements of the War Department and will forward such reports, after approval thereof

Plaintiff's Exhibit "Q"—(Continued)

by property authority, through established channels to the sources of the requests. [54]

1-21-44 (10-15-43; 9-24-43)

305 PR 3

Pr 3 Contracts

CONTRACTS

Section I

GENERAL

(301) Recission of regulations. — Army Regulations 5-200, dated January 2, 1940, as amended, and all other prior directives and instructions of whatsoever nature relating to the making of contracts are hereby rescinded.

(301.1) Compliance with Procurement Regulation No. 3.—Unless otherwise specifically provided, compliance with any provision of Procurement Regulation No. 3 or of any amendment thereto which requires a change in contract procedure or in any contract provision shall not be mandatory until thirty days after the issuance of such regulation or amendment.

(302) Definitions.—As used in these Procurement Regulations the following terms will have the meanings assigned to them in the following paragraphs:

(302.1) United States and Government.—These terms are synonymous and include the War Department.

(302.2) Contractor.—A contractor is any per-

Plaintiff's Exhibit "Q"—(Continued)

son, partnership, company, or corporation (or any combination of these) which is a party to a contract with the United States.

(302.3) Contracting officer.—(1) A contracting officer is an officer or civilian official of the War Department who has been appointed by any one of the following persons, or by their direction, or in accordance with such orders and regulations as they may prescribe for their respective commands, to execute contracts on behalf of the United States:

- (a) the Secretary of War;
- (b) the Under Secretary of War;
- (c) the Commanding General in a Theatre of Operations;
- (d) the Commanding General, Army Air Forces;
- (e) the Director, Purchases Division, Army Service Forces;
- (f) the Chief of any Technical Service.

(2) Unless otherwise specifically provided, the words "the contracting officer", when used in these Procurement Regulations or in any [55] existing or future contract, supplemental agreement or change order, are construed to include:

- (a) his duly appointed successor or authorized representative;
- (b) any and all contracting officers, acting within the scope of the orders respectively appointing them contracting officers.

(3) Representatives may be designated as follows:

Plaintiff's Exhibit "Q"—(Continued)

(a) the Chief of a Technical Service may designate any officer or civilian official to act as representative of the contracting officer or his duly appointed successor;

(b) a commanding officer may designate any contracting officer assigned to his command or station to act as representative of any other contracting officer assigned to the same command or station, or of a contracting officer's duly appointed successor so assigned;

(c) a contracting officer, his duly appointed successor, and any representative designated pursuant to (a) or (b) of this subparagraph (3), may respectively designate any officers or civilian officials to act as their representatives.

(4) A designation authorized by subparagraph (3) may be made by instructions referring to particular contractual instruments or classes of instruments, and may, to the extent not specifically prohibited by the terms of the contractual instrument involved, empower the representative to take any or all action thereunder which could lawfully be taken by the contracting officer. In no event, however, shall a representative, by virtue only of his designation as such, be empowered to execute any contract or supplemental agreement (as distinguished from change order). Of course, if the representative is a contracting officer, he may, pursuant to the order appointing him a contracting officer, execute contracts or supplemental agreements.

Plaintiff's Exhibit "Q"—(Continued)

(5) Any person duly appointed a contracting officer in accordance with subparagraph (1) above, with authority to execute contracts on behalf of a particular technical service, service command or the Army Air Forces may execute contracts on behalf of any other service when the necessary funds, if any, have been made available.

(6) All action heretofore taken which would have been valid if this paragraph 302.3 had then been in effect, is hereby ratified and confirmed. [56]

310 Pr 3

Pr 3 Contracts

Army Specialized Training Division, Office, Director of Military Training:

Contract for Training in Medicine and Dentistry

Contract for Training in Veterinary Medicine

Training Unit Contract

Special Services Division, Office, Director of Personnel:

Contract for Correspondence Instruction

Contract for Physical Distribution of 16mm
Films

Contract for Physical Distribution of 35mm
Films

Contract for Production Services and Articles,
Materials, Equipment and Facilities in Con-
nection with Production of Films

Government Job Order and Contractor's Accep-
tance under Contract for Productions Ser-
vices, etc.

Plaintiff's Exhibit "Q"—(Continued)

Contract for Radio and Phonograph Recordings
Service Commands:

General and Medical Laundry Contracts (see
Memorandum No. S5-93-43, Office of The
Adjutant General, May 22, 1943)

(304.2) Contract.—As used in this Section, the term "contract" means any contract except supplemental agreements and change orders and except those contracts referred to in paragraphs 720 to 725, 1014 and 1015.

(304.3) Price.—As used in this Section, the term "price" means in the case of a lump-sum contract (or supplemental agreement or change order relating thereto), the stated price, and in the case of a cost-plus-a-fixed-fee contract (or supplemental agreement or change order relating thereto), the estimated cost plus the fixed-fee.

(304.4) Technical Service.—Whenever authority is conferred by this section upon a technical service, that authority may be exercised by the chief of the technical service or by any officer or officers or civilian official or officials whom he may designate, subject to such regulations as he may prescribe.

(305) Making and approval of awards of contracts, supplemental agreements and change orders.

(305.1) Authority of technical services to make awards.—All awards of contracts, supplemental agreements and change orders, other than those described in paragraph 305.2, may be made by the

Plaintiff's Exhibit "Q"—(Continued)

technical service concerned without approval of higher authority. [57]

(305.2) Awards requiring the approval of Director, Purchases Division.—(1) The following awards must be submitted for approval to the Director, Purchases Division, Headquarters, Army Service Forces:

(a) Awards of contracts (other than Architect-Engineer Management or similar contracts) involving a price of \$5,000,000 or more, and awards of supplemental agreements and change orders which have the effect of increasing the price of contracts (other than Architect-Engineer, Management or similar contracts) by \$5,000,000 or more.

(b) Awards of Architect-Engineer, Management or similar contracts when the construction contracts to which they relate involve a price of \$5,000,000 or more, and awards of supplemental agreements and change orders affecting Architect-Engineer, Management, or similar contracts when the changes being concurrently made in the construction contracts to which they relate have the effect of increasing the price of the construction contracts by \$5,000,000 or more.

(2) If it is desired to execute a preliminary contract, as defined below, with a particular contractor, and the choice of contractor presents no real alternative, it shall not be necessary to obtain any approval pursuant to sub-paragraph (1) above. Such approval will, however, be obtained prior to the execution of the final definitive agreement, if

Plaintiff's Exhibit "Q"—(Continued)

required by subparagraph (1). The term "preliminary contract", as used in this subparagraph (2), refers to any type of tentative agreement (as, for example, a letter purchase order of the type set forth in paragraph 1307) which, it is contemplated, will be subsequently superseded by a final definitive agreement which will obligate War Department funds in an estimated amount at least twice the amount obligated by the tentative agreement.

(305.3) Submission of contract, supplemental agreement or change order in lieu of award.—In lieu of submitting an award for approval under paragraph 305.2, the contract, supplemental agreement or change order may itself be submitted for approval and manual execution by the Director, Purchases Division, Headquarters, Army Service Forces.

(306) Making and approval of contracts, supplemental agreements and change orders.

(306.1) Authority of technical services to make contracts.—A contract may be made by the technical service concerned without approval of higher authority (provided that approval of the award has been obtained, if such approval is required under paragraph 305.2, [58] and the contract substantially embodies the award as approved), if—

(1) The contract is written on a standard form of contract; or

(2) The contract (a) complies with the requirements of Section VIII of this procurement Regu-

Plaintiff's Exhibit "Q"—(Continued)

lation No. 3 and (b) does not contain any provision or involve any matter of policy which, in the opinion of the technical service, should be considered and passed upon by authority higher than the technical service.

(306.2) In determining whether a contract provision or matter of policy should be considered and passed upon by higher authority, consideration shall be given by the technical service to the following factors among others:

(1) Whether there is involved a conflict with a policy theretofore approved by higher authority;

(2) Whether there is involved a decision on an important question of policy which has not theretofore been passed upon by higher authority;

(3) Whether there is involved a decision on any matter in which uniformity among the several technical services appears to be desirable;

(4) Whether there is involved a decision on an important or doubtful question of law.

(306.3) Authority of technical services to make supplemental agreements and change orders.—Except as provided in paragraph 306.5 and in paragraphs 308-A, 308-G, a supplemental agreement to change order modifying a contract (other than an Architect-Engineer, Management or similar contract) may be made or issued by the technical services concerned without approval of higher authority (provided that approval of the award has been obtained if such approval is required under the provisions of paragraph 305.2 and the supple-

Plaintiff's Exhibit "Q"—(Continued)

mental agreement, or change order substantially embodies the award as approved), if—

(1) The technical service had authority to make the original contract pursuant to paragraph 306.1, or the technical service did not have such authority but obtained approval pursuant to paragraph 306.4; and

(2) The provisions and features of the supplemental agreement or change order are themselves such that the technical service would have authority to include them in an original contract pursuant to paragraph 306.1.

Changes in Architect-Engineer, Management or similar contracts may also be made by the technical service concerned, provided that the requirements of [59] subparagraphs (1) and (2) above are satisfied and provided that the change being currently made in the construction contract to which the Architect-Engineer, Management or similar contract relates does not necessitate approval. Supplemental agreements converting cost-plus-a-fixed-fee contracts to a fixed price basis will be governed by the provisions of paragraph 306.5.

(306.4) Contracts, supplemental agreements and change orders requiring approval of Purchases Division.—The approval of the Purchases Division, Headquarters, Army Service Forces shall be obtained, as herein provided, in connection with all contracts other than those specified in paragraph 306.1, and all supplemental agreements and change orders other than those specified in paragraph 306.3.

Plaintiff's Exhibit "Q"—(Continued)

Where approval is necessary solely because one or more provisions of the contract, supplemental agreement or change order fail to comply with the requirements of Section VIII or present a matter or matters of policy which should be considered by authority higher than the technical service, the necessary approval may be obtained, prior to execution of the instrument on behalf of the technical service, on submission of the contract or the material provisions thereof to the Legal Assistant to the Director of Materiel or the Chief, Legal Branch, Director of Materiel, Headquarters, Army Service Forces, whose approval will be signified by indorsement, memorandum, letter or telegram in response to the request for approval; or on submission of the contract, supplemental agreement or change order, after execution on behalf of the technical service, for approval and manual execution by the Director, Purchases Division. In every other instance the contract, supplemental agreement or change order must be submitted, after execution on behalf of the technical service, for approval and manual execution by the Director, Purchases Division. Upon receipt of requests for the approval of deviations from the contract clauses set forth in paragraphs 365.1-365.9, the Legal Assistant to the Director of Materiel or the Chief, Legal Branch, Director of Materiel, Headquarters, Army Service Forces, will attend to all necessary clearances with the Contract Insurance Branch, Special Financial Services Division, Headquarters, Army Service Forces. [60]

PURCHASE ORDER OLYMPIC COMMISSARY CO.

P. O. BOX 83
PASCO, WASHINGTON

ORDER NO.

ORDER NUMBER MUST BE PLACED
ON EACH ITEM, PACKAGE, COM
MERCE, AND INVOICE.
COMPLETE PACKING LIST MUST
PART EACH INVOICE.

DATE

TO

REQUIRED
SHIPPING DATE
PROMISED
SHIPPING DATE
PRIORITY RATING
CERTIFICATION OF PAYING
O.M.P. ALLOTMENT NO.
END USE—SPECIAL
U. S. GOVT. CONTRACT NO. W-7412-ENG. 1

PLEASE SHIP, SUBJECT TO THE CONDITIONS ON THE REVERSE SIDE OF THIS ORDER, THE FOLLOWING MATERIAL:

PLEASE PREPARE OLYMPIC INVOICE SET FURNISHED YOU, AND FOLLOW DESCRIPTION SHOWN BELOW. MAIL INVOICES TO OLYMPIC COMMISSARY CO.,
BOX 83, PASCO, WASHINGTON.

ITEM NO.	QUANTITY	DESCRIPTION
L		

C-3950

Plaintiff's Exhibit No. 1

SHIP AS FOLLOWS:

TO CAMP MANAGER,
OLYMPIC COMMISSARY CO.,
HANFORD ENGINEER WORKS.

OLYMPIC COMMISSARY CO.
ISSUING POINT HANFORD, WASH.

VIA

BY

PURCHASING AGENT

P. O. S. TERMS

DETACH BEFORE MAILING TO VENDOR

ITEM NO.	ACCOUNT	ISSUED BY
		APPROVED FOR OLYMPIC COMMISSARY CO.
		APPROVED FOR E. I. DU PONT DE NEMOURS & COMPANY
		APPROVED FOR U. S. GOVERNMENT

Original for Vendor

[Printer's Note: Reverse side of Purchase Order. Plaintiff's Exhibit "R".]

CONDITIONS AND INSTRUCTIONS

Acknowledgment — Immediate acknowledgment required, with full delivery information.

Title—The material to be furnished hereunder is for the benefit of the United States Government and title thereto will pass to the United States Government upon delivery, subject to subsequent inspection and acceptance of the material; if specifications are not met, material may be returned at seller's expense.

Inspection—The material to be furnished on this order shall be subject to Olympic expediting and inspection at the seller's plant.

Payment Discount—Payment is contingent upon acceptance of material. Discount period shall be calculated from date of an acceptable invoice.

Drafts—Will not be honored.

Bill-of-Lading—Unless otherwise agreed all rail or common carrier motor truck shipments must be made collect. The original and two copies of collect commercial Bill-of-lading showing shipper's number endorsed on the face "Military Property of the United States, for Military Use, subject to conversion to Government Bill-of-lading at destination," must be mailed to the consignee as soon as original Bill-of-lading is receipted by the Carrier. For all other shipments, a comparable paper must accompany invoice.

Trucking—Interstate truck shipments must be made by carrier authorized under the Motor Carrier Act of 1935. If made by unlicensed carrier shipment will be subject to rejection.

Packages—Must bear buyer's order number and show gross, tare and net weights and/or quantity. No charge allowed by the buyer unless otherwise agreed.

Cartage—No charge allowed by buyer unless otherwise agreed.

Patents—Seller warrants that the use or sale of the material delivered hereunder will not infringe the claims of any patent covering the material itself; but does not warrant against infringement by reason of the use thereof in combination with other materials or in the operation of any process.

Taxes—The seller agrees to pay any taxes imposed by law upon or on account of the within material, unless otherwise agreed.

All items are for use on a United States Government project and therefore may be exempted from Federal excise taxes. The buyer will furnish an exemption certificate in the form approved by the Bureau of Internal Revenue where the seller has specifically stated in his bid the amount of Federal taxes otherwise applicable to the purchased article or its constituent parts.

This purchase is being made for resale and has been approved by the United States, and neither the Washington retail sales tax nor the Washington compensating tax is applicable thereto.

Non-Discrimination—The supplier or contractor, in performing the work herein specified, shall not discriminate against any worker because of race, creed, color or national origin.

Returnable Containers—Government regulations prohibit payments for returnable containers; therefore, any billing for such containers must be made in memorandum only and not for reimbursement. The memorandum should show return shipping instructions.

Assignment—Any contract resulting from this order shall be assignable to the United States Government.

Labor—The seller warrants that in the performance of this order it will comply with the Fair Labor Standards Act of 1938, and any amendments thereto.

Renegotiation—If this order involves a fixed price or lump sum in excess of \$100,000.00, it is subject to the attached provisions covering renegotiation pursuant to the Sixth Supplemental National Defense Appropriation Act, 1942.

Price Regulation—By accepting this order the Seller warrants that no price or other charge to the Buyer hereunder will be in violation of the price control regulations of the United States Government.

Domestic Articles—Seller warrants that food or clothing sold hereunder has been produced or manufactured in the United States substantially all from articles, materials or supplies mined, produced or manufactured in the United States.

PLAINTIFF'S EXHIBIT "S"

United States of America

War Department

Washington, 9 June, 1944

I Hereby Certify that the attached sheet, containing among other things, paragraphs 703.06 and 703.09 of Chapter VII, "Claims and Claims Litigation, Contracts, Methods of Purchase", Orders and Regulations, Corps of Engineers, U. S. Army, last revision 1 February 1943, is a true extract of such regulations issued by the Office of the Chief of Engineers, Washington, D. C., and on file in said office. I further certify that the contracting authority of Division Engineers, of the Corps of Engineers, War Department, described in the regulations above referred to is now in full force and effect, said authority having first been granted by Office of the Chief of Engineers' Circular Letter (Administrative No. 45) (Contracts and Claims No. 11), dated 22 December, 1941, the original of which is on file in the Office of the Chief of Engineers, Washington, D. C. I further certify that the attached copy of a letter dated 1 March 1943 (File reference A-43-b) from J. C. Marshall, Colonel, Corps of Engineers, District Engineer, Manhattan District, to Lt. Col. Franklin T. Matthias, Corps of Engineers, at Hanford Engineer Works, Pasco, Washington; and that the attached copy of a letter dated 1 January 1944 (File reference 161 EIDM SA) from F. T. Matthias, Lt. Col., Corps of Engineers, to Major Richard F. Ebbs, Corps of

Engineers, Executive Officer, Hanford Engineer Works, Pasco, Washington, are true copies of records on file in the United States Engineer Office, Hanford Engineer Works, Pasco, Washington; and I further certify that the authorities described in the foregoing communications are now in full force and effect and have been in full force and effect from their respective dates.

H. C. KILPATRICK JPT

Major, Corps of Engineers,
Executive Officer. JD

I Hereby Certify that Major H. C. Kilpatrick, who signed the foregoing certificate, is the Executive Officer to the Chief of Engineers, and that to his certification as such full faith and credit are and ought to be given.

In Testimony Whereof I, Henry L. Stimson, Secretary of War, have hereunto caused the seal of the War Department to be affixed and my name to be subscribed by the Assistant Chief Clerk of the said Department, at the City of Washington, this 9th day of June, 1944.

[Seal] HENRY L. STIMSON,

Secretary of War

By J. C. COOK,

Assistant Chief Clerk

War Department Form No. 7 [68]

Extract from Chapter VII, "Claims and Claims Litigation, Contracts, Methods of Purchase," Orders and Regulations, Corps of Engineers, U. S. Army, last revision 1 February 1943.

703.06. Designation of contracting officers. a. General.—Public funds under the control of the Corps of Engineers shall be obligated by contracts by such officers and employees only as are specifically designated as “contracting officers.”

b. Officers who are contracting officers by virtue of positions.—District Engineers, Division Engineers, and the President of the Mississippi River Commission are contracting officers by virtue of positions held.

c. Power of redelegation of contracting officer, authority.—Except as may be specifically stated in a designation of a contracting officer by the Chief of Engineers, only District Engineers and Division Engineers are authorized to redelegate, subject to the provisions of subparagraph d, below, any part of their contracting authority. Such power of redelegation shall not be construed to include the redelegation of power to approve contracts.

d. Redelelegation of contracting officer authority.—It is essential that District Engineers and Division Engineers avail themselves of the power of delegation and it is expected that they will do so. In the redelegation of contracting officer authority, such officers should give contracting officers such contractual authority as is necessary for their expeditious and efficient functioning, not to exceed that possessed by District Engineers, where the size of the job and the qualifications of personnel so warrant.

e. President of the Mississippi River Commission.—The President of the Mississippi River Com-

mission shall have contracting officer authority equivalent to that of a Division Engineer.

f. Letters of designation.—Officers and employees designated as contracting officers by District and Division Engineers shall be designated as such by letter stating the period and the limit of authority granted, and such letter shall be exhibited by the officer or employee if required as evidence of his authority. Such designations may be made for a limited or unlimited period of time but shall delineate the contracting officer's authority by stating the monetary limit on his authority, the types of contracts to be executed, etc. Such designations may be revoked by the officer by whom issued, or his successor. A copy of all such letters of designation and revocation and prompt notice of the termination of such authority due to transfer, death or other causes shall be promptly transmitted to the Chief of Engineers, Attention: [59] Contracts and Claims Branch, Administrative Division.

g. Contracts to be executed in person.—Contracting officers shall personally sign contracts entered into by them on behalf of the United States and cannot delegate this authority to others.

703.09. The award of contracts, change orders, and supplemental agreements thereto.—General.—The award of contracts, change orders, and supplemental agreements hereinafter referred to in this paragraph as "contracts", may be made as follows:

(1) District Engineers are authorized to award all contracts not exceeding \$3,000,000.

(2) Division Engineers are authorized to award all contracts of less than \$5,000,000 and to authorize contracting officers under their jurisdiction, including District Engineers, to award contracts over \$3,000,000, and less than \$5,000,000.

(3) The President, Mississippi River Commission, is authorized to award contracts of less than \$5,000,000.

In Reply Refer To

War Department
United States Engineer Office
Manhattan District
P. O. Box 42
Station F
New York, N. Y.
A-43-b

March 1, 1943

Received Mar. 31, 43, Office of Area Engineer,
Hanford Engineer Works, Pasco, Wash.

[In margin]: CE 201 (Matthias, F.T.)

Subject: Delegation of Administrative and Contractual Authority as Area Engineer:

To: Lieutenant Colonel Franklin T. Matthias,
Corps of Engineers, Area Engineer, Hanford
Engineer Works, Pasco, Washington.

1. As Area Engineer for the Hanford Engineer Works of the Manhattan Engineer District, authority is hereby delegated to you as follows:

a. To act as Contracting Officer for the Manhattan Engineer District with authority to make

procurements and to negotiate and sign contracts for performance within the Hanford Engineer Works and contracts emanating within the Hanford Engineer Works for performance elsewhere, as follows:

(1) All informal contracts.

(2) All formal contracts, except those involving plant expansions, in amounts not exceeding \$3,000,000.00.

b. To supervise the performance of all contracts signed by yourself or by other contracting officers of the Manhattan Engineer District for performance within the Hanford Engineer Works, and to take all action and to make all decisions in connection therewith, including the aproval [70] of sub-contracts and third party equipment rental agreements, which are required to be given by the Contracting Officer or by the District Engineer.

c. To authorize and approve travel by civilian and military personnel; to certify vouchers and to perform all other administrative functions as are necessary for the proper administration of the Hanford Engineer Works.

2. This delegation of authority shall remain in effect until revoked. The authority contained in paragraph a is personal to you and may not, in your absence, be redelegated to others. The authority contained in paragraphs b and c may, within your discretion, be further delegated to such civilian or military assistants as may be necessary to carry out the work. Any such authority redelegated to

others must be in writing, and a copy thereof furnished to this office.

J. C. MARSHALL

Colonel, Corps of Engineers
District Engineer.

Dispatched Mar. 25, 1943, Manhattan Engineer District, New York, N. Y.

In Reply Refer to 161 EIDM SA

War Department
United States Engineer Office
Hanford Engineer Works
P. O. Box 550
Pasco, Washington

1 January 1944

Subject: Delegation of Authority.

To: Major Richard F. Ebbs, Corps of Engineers, Executive Officer, Hanford Engineer Works, Pasco, Washington.

1. Pursuant to the authority vested in the Area Engineer, Hanford Engineer Works, Pasco, Washington by letter of the District Engineer, Manhattan District dated March 1, 1943, Subject: "Delegation of Administrative and Contractual Authority as Area Engineer," authority is hereby delegated to you as follows:

a. To supervise the performance of all contracts signed by the Area Engineer or by other contracting officers of the Manhattan Engineer District for

performance within the Hanford Engineer Works, and to take [71] all action and to make all decisions in connection therewith, including the apuroval of subcontracts and third party equipment rental agreements which are required to be given by the Contracting Officer or by the District Engineer.

b. To authorize and approve travel by civilian and military personnel: to certify vouchers and to perform all other administrative functions as are necessary for the proper administration of the Hanford Engineer Works.

2. This delegation of authority shall remain in effect until revoked.

F. T. MATTHIAS

**Lt. Col., Corps of Engineers
Area Engineer [72]**

PLAINTIFF'S EXHIBIT "T"

OP-55 5M 6-43 Prompt

OLYMPIC COMMISSARY CO.

Hanford Engineer Works

Date 12-13-43

Req. No. 19609

RECORD OF PURCHASE

Order No. OCC 3881

Material Milk (Unit #1)

Quotations Received— Name of Bidder	Promised Shipping Date	Price Quoted
McClintock-Trunkey Company, Spokane, Washington	Dec. 20, 1943	\$5118.75
Central Grocery Company, Yakima, Washington	Dec. 20, 1943	\$5125.00
Interior Grocery Company, Walla Walla, Wash.	Dec. 23, 1943	\$5125.00
Pacific Fruit & Produce Com- pany, Walla Walla, Wash.....	Dec. 23, 1943	\$5125.00

Quotation Accepted—Name of Bidder	Reason Supplier Selected
McClintock-Trunkey Com- pany, Spokane, Wash.	[x] 1. Lowest Price Four Bids
	[] 2. Early Delivery
	[] 3. Better Quality
	[] 4. Required Design
	[] 5. Only Available Source Known
Amount: \$5118.75	
F.O.B. Hanford,	[] 6. Price Agreement
Washington	[] 7. As Per Contract
Net 30 days	[] 8.

Final Approvals:

Correct: R W

For Olympic Commissary Co.

L. R. BELT

By J. H. BUNKER (Signed)

For E. I. Du Pont De Nemours & Co.

By C. D. McCULLAH

[Marginal Note]:

(Signed)

(Initials—not legible)

For U. S. Government

By HARRY R. KADLEC (Signed)

Copy for U. S. Government—Hanford, Wash.

Sheet 4

Dec. 14, 43

Plaintiff's Exhibit "T"—(Continued)

PURCHASE ORDER

Order No.

385

12-20-43

OCC-3881

McCLINTOCK-TRUNKEY COMPANY

Dec. 23, 1943

S 119 Stevens Street

Dec. 20, 1943

Spokane, Washington

Dec. 20, 1943

Vendor's Invoice Date	Vendor's Invoice No.	Car No.	Weight of Shipment	Net Amount of Invoice	Freight All'd or Charged	APV No.
Accomplished				Accomplished		
Bu Vou. 1653				Bu Vou. 17455		

1	1250 cs.	48 talls	Federal Milk	@ 4.095 cs.	\$5118.75
---	----------	----------	--------------	-------------	-----------

Confirmation:—Do Not Duplicate

Terms:—30 days net

A variance in quantities not to exceed 10% of the stated amount will be accepted as compliance with the terms of the purchase order.

- | | | |
|----|--------------------|--------------------------------|
| 3* | 1. Lowest Price | 5. Only Available Source Known |
| | 2. Early Delivery | 6. Price Agreement |
| | 3. Better Quality | 7. As Per Contract |
| | 4. Required Design | 8. |

[Printer's Note: * Figure in longhand.]

Ship as Follows:

To Camp Manager, Olympic Commissary Co.,

Hanford Engineer Works, Hanford Washington. Unit #1.

Via Rail Car

F.O.B. Terms Hanford, Washington

Supplier Selected Because of Reason Number (1) Above

Issued by

Item No.

Account

Approved for Olympic Commissary Co.

J. H. BUNKER

(Initials not legible)

Approved for E. I. Du Pont De

Nemours & Company

J. M. LENLEY

Approved for U. S. Government

E. C. SCHULTE

Sheet #1

Copy for U. S. Government

OCC-3881

Plaintiff's Exhibit "T"—(Continued)

OOC-13 279-289

OLYMPIC COMMISSARY CO.

Information for which space is here provided must be supplied by shipper or invoice will be returned and discount calculated from date correct invoice is received.

Consigned to Unit #1
 Shipped Via Drop Shipment
 Car No. and Initial.....
 Originating Point.....
 Shipping Weight.....Lbs.
 Bill of Lading No.....
 Prepaid or Collect.....
 Terms:
Per Cent.....Days.....Days
 Net

Delivery

F.O.B.....

Receipted Expense Bill Must
 Accompany all Charges for
 Transportation

Olympic Vou. No.....

Olympic Order No. OCC-3881

Date 12/23/43

Hanford Engineer Works

P. O. Box 23

Pasco, Washington

Seller's No. 17241

Bought of McClintock-Trunkley
 Company

Street and No. So. 119 Stevens

City and State Spokane, Washington

Original Bill of Lading, and Two
 Copies must accompany this invoice
 or must be furnished promptly after
 receipt of shipping instructions.

Item. No.	Quantity	Description	Points	Unit Price	Amount
	1250 cs	48/Tall Federal Milk	60,000	4.10	* 5125.00
		M.R.			

Vendors Invoice	5125.00
-----------------	---------

Less adj. due to overcharge in unit price. Should be 4.095	* —6.25
--	---------

Amount of Invoice	5118.75
-------------------	---------

JM

Final Approval for Olympic By AM	Approved for Olympic for Payment Only By B 1	Approved for Du Pont By	Approved for Dupont By
For Olympic	Audit Schedule	For Du Pont Initials Date	Cash Discount
F	Extensions and Foot- ings Verified		
G	Entered in Invoice Register		Freight
JM	Prices and Delivery Terms Compared with Purchase Order	FH	Net Amount of Invoice
Mat'l	Compared with Rec. Report No.	FH	5118.75
Rec'd As Ordered	13608		Check No. Jan 4-1944
JHW	Transportation Charge Approved		39.63 MTM

Plaintiff's Exhibit "T"—(Continued)

OP-21002—Ten Part

13608

OLYMPIC COMMISSARY CO.

RECEIVING REPORT

Consignor: McClintock Trunkey Co.

Order Ref. OCC 3881

Sh'p'd from Spokane, Wn.

Date 12/26/43

Car Initial & Number.....

Freight Bill No.....

Freight Charges.....

Via DuPont Trk

Item No.	Quantity	Description	Weight
	1250 cs	Milk, Evaporated 48/ talls pr cs	

Differences between materials ordered and received 12/31/43 hr
covered by material exception report No.

Lindeman

.....
Olympic Checker

Approved:

The Above Material Re-
ceived, Inspected and Ac-
cepted by Olympic Com-
missary Co.

R. GREINER
Olympic Representative

.....
Du Pont Representative

Item No.	Charge	Originator of Pur- chase Req
	MS - 25	Williamson

Approved in Accordance
with the Requirements of
the Administrative Audit
Manual

Disposition of
Material
#1, Hanford

1

.....
U. S. Government
Representative

GENERAL ACCOUNTING
OFFICE PREAUDIT

U.S. WAR DEPT. U. S. ENG. OFF. MANHATTAN DIST, OAK RIDGE

PAID BY

Voucher prepared at HANFORD, WASHINGTON Mar 2 1944

C. VANDEN D'ELCK
Lt. COL. C.E. U.S.A.
211-500

THE UNITED STATES, Dr.

T. E. I. DUPONT DE NEMOURS & COMPANY

411 P. O. Box 429 PASCO, WASHINGTON

Payee's Account No. D 1653

(For use of Paying Office)

Contract No. W-7412 eng-1 Date 12/1/42 Reg. No. Date Invoice Rec'd

22,258.44

MEMORANDUM

Contract not on file in O. & A. I.

M. BARRETT 1st Lt. C.E.
Asst Administrative Officer

ACCOUNTING CLASSIFICATION (for completion by Administrative Office)

Appropriation, limitation, or project symbol	Appropriation title				Line Item or Project Amount	Appropriation Amount
210A-141	E-P-82-E-A-S-1949-14-S-4462-PI10-10					22,58.44
212/40905	ENGINEER SERVICE ARMY 1910-14 S 31110 P 30-10 A 0905-24					
Account symbol	Amount	Obligations liquidated	COST ACCOUNT		OBJECTIVE CLASSIFICATION	
			Symbol	Amount	Symbol	Amount
			3	135		

Paid by { Check No. Non-payment voucher 19... for \$2,245.04 } on Treasurer of the United States in favor of
 Cash \$ Do not issue check 19... Payee _____ } payee named above.

* When a country is placed or mentioned in the name of a company or corporation, the name of the person writing the document or corporate name, as well as the country in which he lives, must appear. For example: "John Doe Company, per John Smith, Secretary," or "The Firm," as the case may be.
† If the letter is copied and authorized to approve are published in this paper, the signatures only is necessary; otherwise the approving officer will sign in the blank space below. Approved for _____, and over his official title.

Per _____
Title _____

Plaintiff's Exhibit "T"—(Continued)

No extras

Standard Form No. 1035—Revised

Form approved by

Comptroller General, U. S.

June 8, 1937

(Gen. Reg. No. 51, Sup. No. 7)

PUBLIC VOUCHER FOR PURCHASES, AND SERVICES
OTHER THAN PERSONAL

CONTINUATION SHEET

U. S. HANFORD ENGINEER WORKS Sheet No. of Bureau Voucher No. 1653
(Department, Bureau, or Establishment.)

ARTICLES OR SERVICES

(Enter description, Item Number of
Contract or General Supply Sched-
ule, and other Information deemed
necessary)

Terms.....% Discount Cash.....Days

No. and Date of Order APV #	Date of Delivery of Service Check #	Quantity	Unit Price Cost Per RPG #	Amount Dollars Cts.
17455	25198		53 1/2	5,108.19
18703	25568		53 1/2	17,150.25

Sheet #1

Total 22,258.44

Note.—This form to be used as a "Continuation Sheet" where more than one sheet is required, carry-
ing forward the total or totals to, or summarizing them upon Form No. 1034.

Plaintiff's Exhibit "T"—(Continued)

Standard Form No. 1035—Revised

Form approved by

Comptroller General, U. S.

June 8, 1937

(Gen. Reg. No. 51, Sup. No. 7)

U. S. HANFORD ENGINEER WORKS

(Department, Bureau, or Establishment,)

PUBLIC VOUCHER FOR PURCHASES, AND SERVICES
OTHER THAN PERSONAL

CONTINUATION SHEET

Sheet No. of Bureau Voucher No. 1653

ARTICLES OR SERVICES

(Enter description, Item Number of
Contract or General Supply Sched-
ule, and other Information deemed
necessary)

Terms.....% Discount Cash.....Days

No. and Date of Order APV #	Date of Delivery of Service Check #	Quantity RPG #	Unit Price Cost Per	Amount Dollars Cts.
-----------------------------------	---	-------------------	------------------------	------------------------

NON PAYMENT VOUCHER

When approved as for payment, the amount of this voucher is to be applied
against and in liquidation of the advance payment made to the contractor
under contract entered into November 6, 1943. No. W 7412 eng-1.

Bu Vou #10-918 D. O. #402 Date Feb. '43 Amt.....

Bu Vou #..... D. O. #..... Date..... Amt.....

Accounts of C. E. VandenBulek, Lt. Col., C. E. Disbursing Officer, 211-500

Sheet #2

Note.—This form to be used as a "Continuation Sheet" where more than one sheet is required, carrying
forward the total or totals to, or summarizing them upon Form No. 1034.

Total

16.26212-1

Plaintiff's Exhibit "T"—(Continued)

RG-20013

(Du Pont Cut)
Reg. U. S. Pat. Off.

E. I. DU PONT DE NEMOURS & COMPANY

Incorporated

Hanford Engineer Works

P. O. Box 429

Pasco, Washington

Information for which space is here provided must be supplied by shipper or invoice will be returned and discount calculated from date correct invoice is received.

Consigned to.....
Shipped via.....
Car No. and Initial.....
Originating Point.....
Shipping Weight.....lbs.
Bill of Lading No.....
Prepaid or Collect.....

Du Pont Vou. No. 17455

Du Pont Order No. RPG 531/2

Date 1/11/44

Seller's No. G 448

Terms :
per cent.....days.....days net

Bought of Olympic Commissary Co.

Street and No.

City and State: Hanford, Washington

Delivery
F.O.B.....

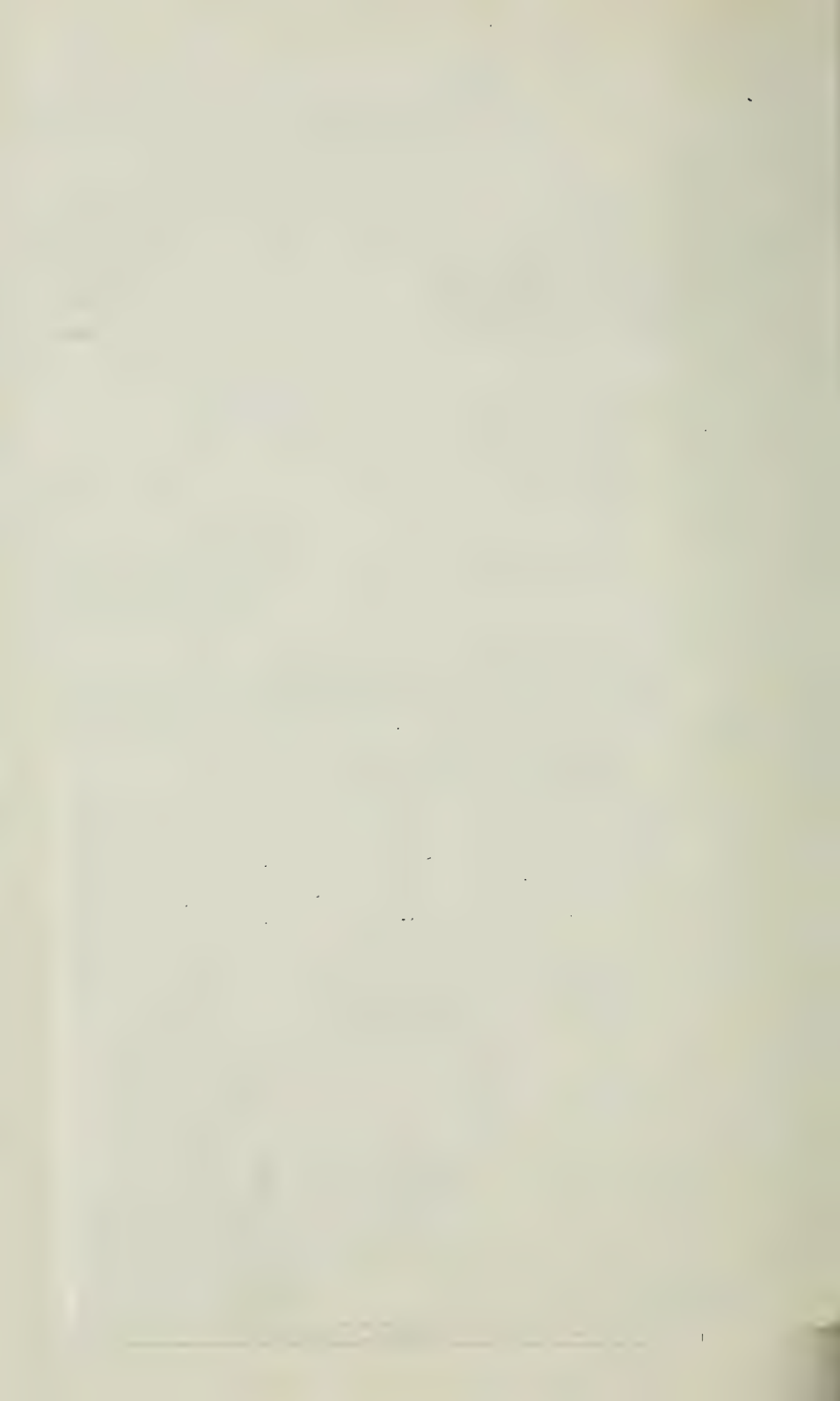
Receipted Expense Bill Must
Accompany All Charges for
Transportation

Original Bill of Lading and Two Copies Must Accompany This Invoice
or Must Be Furnished Promptly After Receipt of Shipping Instructions

Item No.	Quantity	Description	Unit Price	Amount
1/4 1	CK 3963	McClintock-Turnkey Co.	3881	5118.75
12/23 2	"	" "	2941	.66
" 3	"	" "	" FH	3.52
" 4	"	" "	"	2.86
" 5	"	" "	"	3.52
" 6	"	" "	"	3.52

Final Approval for DuPont	Approved for Du Pont for Pay- ment Only	Approved for U. S. Government	Approved for U.S. Government for Payment	Amount 5108.19 of \$5104.67 FH Invoice
By..... (Signature not legible)	By.....	By..... For Chief Fiscal Auditor	By..... For Contracting Officer	

	For Du Pont	Audit Schedule	For U. S. Government Initials Date	Cash Discount
CONSTRUCTION	OC	Extensions and Footings		Freight
C-1		Verified		
FE 27.6		Entered in Invoice		Net 5108.19 FH
Sheet #3		Register		Amount \$5104.67
	FH	Prices and Delivery Terms Compared with Purchase Order		of Invoice
Original for U. S. Government	Mat'l Rec'd as Ordered FH	Compared with Rec. Report No		Check No. 25198 Jan. 20, '44
		Transportation Charge Approved		



[Endorsed]: No. 11063. United States Circuit Court of Appeals for the Ninth Circuit. Richard Roland Haugen, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Eastern District of Washington, Southern Division.

Filed July 2, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11063

RICHARD ROLAND HAUGEN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS UPON WHICH AP-
PELLANT INTENDS TO RELY AND
DESIGNATION OF PARTS OF RECORD
TO BE PRINTED

Appellant, Richard Roland Haugen, for his statement of points upon which he intends to rely on his appeal to this Court from the judgment and conviction entered by the District Court of the United

States for the Eastern District of Washington, Southern Division, on May 7, 1945, hereby adopts the specifications of errors contained in his assignments of error filed by him on June 18, 1945.

DESIGNATION OF PARTS OF RECORD
TO BE PRINTED

Pursuant to Rule 19(6) of the Rules of this Court, appellant, Richard Roland Haugen, states that the entire record on appeal is necessary for the consideration of the appeal from the judgment and conviction herein, and that, accordingly, appellant designates for printing the entire record, including the exhibits.

Dated this 25th day of June, 1945.

ROBERTSON & SMITH

By DEL CARY SMITH Jr.

Attorneys for Appellant,

Richard Roland Haugen

Service of the foregoing statement of points on which appellant intends to rely and designation of parts of record to be printed is hereby accepted, and the receipt of a copy thereof is hereby acknowledged this 25th day of June, 1945.

EDWARD N. CONNELLY

United States Attorney, Counsel for Appellee,
United States of America.

[Endorsed]: Filed July 2, 1945. Paul P. O'Brien, Clerk.

No. 11063

IN THE

United States

Circuit Court of Appeals
FOR THE NINTH CIRCUIT

RICHARD ROLAND HAUGEN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

*Upon Appeal from the District Court for the Eastern
District of Washington, Northern Division*

Brief for the Appellant

ROBERTSON & SMITH,

By DEL CARY SMITH, Jr.,

Spokane & Eastern Bldg.,

Spokane, Washington,

Attorneys for Appellant.

FILED

OCT 23 1945

PAUL B. O'BRIEN

No. 11063

IN THE

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Spokane, Washington,

Attorneys for Appellant.

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STATEMENT OF PLEADINGS AND FACTS DISCLOSING BASIS FOR JURISDICTION

Appellant Richard Roland Haugen appeals from judgment and commitment upon conviction under an indictment charging him with making, forging, counterfeiting, uttering, publishing and possession of obligations of the United States and other writings in violation of Sections 72 and 73, Title 18, U. S. C. A., committed within the Eastern District of Washington, Southern Division.

STATEMENT OF THE CASE

The appellant Richard Roland Haugen was charged by an indictment with a violation of Sections 72 and 73, Title 18, U. S. C. A., ~~with~~ making, forging, counterfeiting, uttering, publishing, and possession of obligations of the United States and other writings. The indictment contained three counts, and charged in substance that appellant on the 19th day of April, 1944, at Hanford, in the County of Benton, in the Southern Division of the Eastern District of Washington, knowing the same to be false, fraudulent and counterfeit had in his possession, with intent that they be uttered and put off as true, approximately 966 counterfeit meal tickets purporting to have been issued by the Olympic Commissary Company, a corporation, which was at the time an agency of the United States and the Army Engineers Corps engaged in the construction of a defense

project at Hanford; that the Olympic Commissary was to furnish and dispense meals to workmen; that the food and supplies from which the meals were prepared were the property of the United States; that the proceeds of the tickets validly issued by the Commissary Company became the property of the United States, and the counterfeit tickets possessed by ~~defendant~~ were not printed, sold or authorized by the United States, the Commissary Company, or any lawful representative of either, but were ordered and purchased by ~~appellant~~ from a private printer and were intended to be used by ~~appellant~~ and others for the purchase of food and meals from the Olympic Commissary Company without lawful payment and with intent to defraud the United States.

Count two charges the sale of six of the counterfeit tickets to one J. L. Holloway, and count three charges the sale of one of such tickets to R. P. McDonald. Each of said counts contained the allegation that such act was with intent to defraud the United States (~~R. 2-7~~).

In 1942 the Government condemned severa hundred thousand acres of land in Benton County, Washington, and the E. I. du Pont de Nemours Company began the construction of a vast defense project. Thousands of men were engaged over a period of two years building this project and millions of dollars were spent. It was a matter of national speculation as to the reason for this

vast undertaking. The secret was well kept for it was not until V-J Day that the American people learned that the Hanford Engineering Works was engaged in the manufacture of the atomic bomb.

The indictment referred to under which defendant was tried was filed August 11, 1944. The defendant had been previously indicted in the spring of 1944 in Cause No. C-3929 and his case came regularly on for trial at 10 o'clock a. m., on June 14, 1944, in Yakima. The defendant had pleaded "not guilty" to this original indictment, and on said date both sides announced themselves ready for trial to the Court without a jury (R. 46). Mr. Etter, an assistant United States Attorney, then made a comprehensive opening statement for the Government. Mr. Sandvig, defendant's trial attorney, moved for an order of dismissal upon the opening statement of counsel for the Government (R. 54).

After discussion and argument, the Court sustained the demurrer to the indictment but ruled that defendant had not been in jeopardy and could be re-indicted, and he was admitted to bail in the sum of \$500.00 (R. 67).

Defendant's counsel specifically reserved the right to raise the question of former jeopardy, to which the Court consented (R. 68).

Subsequently and on October 5, 1944, the defendant was again brought to trial upon the indictment of Au-

gust 11, 1944, which indictment had been returned by the Grand Jury after the Court had sustained the demurrer to the original indictment. The trial was again to the Court without a jury upon stipulation of the parties (R. 68).

The Government introduced the testimony of several witnesses in an attempt to sustain the allegations of the indictment. This evidence tended to establish that defendant, who had been an employee at Hanford, had employed George F. Allen, a printer, at Tacoma, Washington, to print a thousand meal tickets which were reasonable facsimilies of those issued by the Olympic Commissary Company. The evidence also tended to establish that defendant had put off the six tickets mentioned in Count Two to witness Holloway and the one ticket mentioned in Count Three to the witness McDonald. By the witness John Cron, the Chief Cashier of the Olympic Commissary, and Major R. F. Ebbs, the Executive Officer of the Hanford Engineering Works, it was sought to establish that the Olympic Commissary Company was an agency of the United States and that defendant possessed and uttered the counterfeit tickets with intent to defraud the United States. Timely objections were made to the introduction of each item of evidence which tended to support these conclusions (R. 103).

The case being tried to the Court without a jury, Major Ebbs was permitted to testify that the du Pont

Company was performing the construction work at Hanford as prime contractor, and the Olympic Commissary Company had a subcontract with du Pont to purvey food. His testimony established that the prime contract with du Pont was secret by order of the War Department (R. 103). The Olympic Commissary subcontract with du Pont was likewise secret (R. 106).

The original contracts which were in the office of the Comptroller General in Washington, D. C., were not offered in evidence, nor were certified copies produced. Having refused to submit the contracts, as the best evidence to the Court or the defendant, the witness was then permitted to testify orally as to their contents which were deemed pertinent under the indictment. The trial Court concedes that "plaintiff's case on the question of the relationship between Olympic Commissary and the Government and in support of its position that these counterfeit meal tickets were intended to defraud the Government was based exclusively upon this testimony as to the content of the contracts" (R. 12).

At the conclusion of the Government's evidence, the defendant rested without the introduction of testimony. The Trial Court took the matter under advisement and on December 22, 1944, filed an opinion, the concluding portion of which states: "Since the plaintiff has failed to present the best evidence available to it, I am forced to conclude that I should have sustained the objection

to the introduction of such testimony. That being true, it is my duty now to disregard it. Without such evidence, plaintiff has failed to sustain its burden that the Olympic Commissary was an agency of the United States and that the counterfeiting of its meal tickets was calculated to defraud the United States. Therefore, the action must be dismissed" (R. 18).

After the filing of the Court's opinion determining the case, counsel for the plaintiff on December 27, 1944, filed a "*Motion to re-open trial in compliance with Court's Memorandum Decision,*" and an Order permitting such re-opening was filed on February 13, 1945 (R. 19-24). The matter then came on for the taking of additional testimony on April 11, 1945. Objection was timely made to the introduction of any further evidence in the case upon the ground that defendant had already been dismissed by the determination of the Court and had been in jeopardy. The objection was overruled and the Government called as its witness Lt. Col. Ralph G. Cornell, the Legal Advisor to the Chief Engineer at Washington, D. C., who was permitted to testify that he had seen the original contract between the Government and the du Pont Company, and the original subcontract between the du Pont Company and the Olympic Commissary Company and to give his conclusions as to the contents and legal effect of the contracts. Based upon this testimony the Trial Court ren-

dered an oral decision reversing his former written memorandum and finding the defendant guilty (R. 176-182).

Judgment and commitment was filed May 7, 1945, under which the defendant was sentenced to imprisonment for one year and one day on each of the three counts of the indictment, the sentences to run concurrently (R. 26).

Defendant filed his notice of appeal May 11, 1945, setting forth his grounds of appeal (R. 27-29).

Pending the determination of the appeal, defendant is at liberty upon bail bond.

ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1

The District Court erred in overruling defendant's plea of former jeopardy by reason of defendant's having been put upon trial for the same offense in case No. C-3929, entitled "United States of America, Plaintiff, vs. Richard Roland Haugen, Defendant," in the above-entitled Court, in which case the Court sustained an oral demurrer to the indictment after the opening statement in behalf of the plaintiff (R. 39).

ASSIGNMENT OF ERROR NO. 2

The District Court erred in admitting over the objec-

tion of defendant hearsay evidence as to the contents of the contract between the United States of America and E. I. duPont deNemours & Company and the sub-contract between the duPont Company and Olympic Commissary Company, the contract being the best evidence, as follows:

“Q. First I wish to ask you some general questions. Who is the company that is doing the construction work at Hanford?

Mr. Sandvig: If he knows of his own personal knowledge.

Mr. Erickson: He is in charge of the construction.

A. Am I to answer if I know it of my own personal knowledge or officially?

Mr. Sandvig: Of your own personal knowledge.

Q. If you know it officially.

Mr. Sandvig: No; of his own personal knowledge.

A. The E. I. duPont deNemours Company.

Q. The E. I. duPont deNemours Company is building the project at Hanford?

A. They are the prime contractor.

Q. By prime contractor you mean they have the contract with the United States government?

Mr. Sandvig: I object as not the best evidence. If there is a contract between the duPont com-

pany and the United States, the contract itself is the best evidence.

The Court: I am inclined to agree with you, but I will let him answer and allow an exception, and I may later strike out the answer. I don't know yet.

(Question read by reporter.)

A. Yes.

Q. Now the contract which the E. I. duPont deNemours Company has with the United States, is that a public contract, or otherwise?

Mr. Sandvig: May it be understood, Your Honor, without bothering the Court all the time, that I am objecting to all of this?

The Court: It is all subject to your objection, and an exception is allowed.

A. The contract is a secret contract.

Q. By whose orders is it a secret contract?

A. By the War Department.

Q. And you have——

The Court: Wouldn't that be a thing which——

Mr. Sandvig: I am taking it for granted my objection goes to all of this.

The Court: The Secretary of War would issue some sort of an order, would he not?

Mr. Sandvig: Yes, sure.

The Court: That it would be secret?

Mr. Erickson: I will establish that, I think.

The Court: All right.

Mr. Sandvig: The order itself would be the best evidence. That is like me saying what the statute is.

The Court: Go ahead, Mr. Erickson.

Q. Did the War Department, or who in the War Department issued that order?

Mr. Sandvig: If you know of your own personal knowledge.

A. The order came to my commanding officer from the office of the Chief of Engineers.

Mr. Sandvig: I make the same objection.

The Court: It is all being admitted subject to your objection.

Mr. Sandvig: I am afraid I will slip up on something.

The Court: You are not going to slip up on anything. You have your objection. It does seem to me, Mr. Erickson, that the order making it secret is something that could be produced.

Q. ((Mr. Erickson)): Is that something that can be produced?

A. I am not sure it was not a verbal order.

Q. Whom did you receive instructions from that the contract was secret?

A. I received verbal instructions from the office of the Chief of Engineers.

Q. And who in that office?

Mr. Sandvig: Subject to my objection.

Q. From whom in that office did you receive the instructions?

A. I received instructions that individual's name was not to be brought into a public hearing.

The Court: What justification could there be for concealing from the public an order which says that the contract is to be secret? He says he has orders to keep secret who gave the order." (R. 102-105)

ASSIGNMENT OF ERROR NO. 3

The District Court erred in permitting the plaintiff to introduce over objection oral secondary evidence as to the legal effect and contents of said contract, particularly between the duPont Company and Olympic Commissary Company, said subcontract being the best evidence, as follows:

"A. The E. I. duPont deNemours Company have a cost-plus fixed-fee contract with the government.

Q. Explain so we can understand——

Mr. Sandvig: The contract is the best evidence.

The Court: Yes; this all goes in over your objection." (R. 108)

ASSIGNMENT OF ERROR NO. 4

The District Court erred in overruling defendant's objection to the introduction of further testimony after the written opinion of the Court filed December 22,

1944, stating, "The action must be dismissed," as follows:

"Q. Will you state your name, please?

Mr. Sandvig: At this time, if the Court please, I want to object to the introduction of any evidence in this case—any further evidence in the case—on the ground and for the reason that the defendant has already been dismissed from the charge predicated against him, and that he has been in former jeopardy.

I just want to make this observation at this time. Your Honor wrote an opinion of the Court. It was signed by Your Honor. You went into the facts. You make your conclusions at considerable length. I do not know of any particular form of findings of fact and conclusions of law or decree or judgment that are required, but you go into it at great length.

The Court: I say at the end that the action must be dismissed.

Mr. Sandvig: Yes. And I say it is dismissed.

The Court: I will overrule the objection. There was no order of dismissal entered, as I construe it." (R. 139-140)

ASSIGNMENT OF ERROR NO. 5

The District Court erred in entering the order permitting reopening, filed February 13, 1945 (R. 23-24).

ASSIGNMENT OF ERROR NO. 6

The District Court erred in admitting in evidence additional hearsay testimony relating to the contract

between the United States of America and the duPont Company after such reopening, as follows:

“Q. Now directing your attention to the original contract between the United States Government and the E. I. duPont deNemours Company, what provision is made in that contract about property used in the prosecution of the work on the Hanford Engineer Works?

Mr. Sandvig: I object to that as not being the best evidence. The witness has the contract before him. They have opened the doors now, and the contract is no doubt admissible. He has been using it for evidence, and certainly the contract is the best evidence. No matter how good a lawyer he may be, we might disagree on its interpretation. The contract itself is the best evidence.

The Court: “The objection is overruled.” (R. 148-149)

ASSIGNMENT OF ERROR NO. 7

There was a total failure of proof and no substantial evidence to prove the intent of the defendant to defraud the United States of America or any agency thereof.

ASSIGNMENT OF ERROR NO. 8

The verdict of the Court and judgment of conviction is contrary to the law and the evidence.

ARGUMENT FOR APPELLANT

Specification of Error No. 4. The District Court erred in overruling defendant's objection to the introduction of further testimony after the written opinion of the Court filed December 22, 1944, stating, “The action must be dismissed,” as follows:

“Q. Will you state your name, please?

Mr. Sandvig: At this time, if the Court please, I want to object to the introduction of any evidence in this case—any further evidence in the case—on the ground and for the reason that the defendant has already been dismissed from the charge predicated against him, and that he has been in former jeopardy.

I just want to make this observation at this time. Your Honor wrote an opinion of the Court. It was signed by Your Honor. You went into the facts. You make your conclusions at considerable length. I do not know of any particular form of findings of fact and conclusions of law or decree or judgment that are required, but you go into it at great length.

The Court: I say at the end that the action must be dismissed.

Mr. Sandvig: Yes. And I say it is dismissed.

The Court: I will overrule the objection. There was no order of dismissal entered, as I construe it." (R. 43)

Specification of Error No. 5. The District Court erred in entering the order permitting reopening, filed February 13, 1945 (R. 44).

The question presented by these assignments is the correctness of the Trial Court's order granting the Motion of plaintiff to reopen the case for further testimony after the Trial Court had determined, in a written opinion, that the testimony offered upon the trial was insufficient, and directing dismissal.

ARGUMENT

In a well-considered opinion, the Trial Court held the plaintiff had not sustained its burden of proof and had not produced the best evidence available to it in permitting Major Ebbs to testify orally to the legal effect and contents of a secret contract, the original of which was in existence, and only a copy of which the witness had seen. He was not a lawyer, although he had in his command a staff of legal experts. The plaintiff made no showing that it could not produce a witness who had seen the original contract and who had sufficient legal training and knowledge to testify as an expert to its contents and legal effect.

The Trial Court took the view that secondary evidence is admissible under proper circumstances in criminal as well as civil cases, relying upon *U. S. v. Gooding*, 25 U. S. 460.

Without conceding the correctness of this view, the plaintiff wholly failed to lay the foundation or fulfill the requirements necessary before such evidence can be received. There was no showing that Lt. Col. Cornell, who was ultimately permitted to testify, was not as available to the plaintiff as a witness at the time of the trial on October 5, 1944, as when he ultimately did testify at the hearing for taking of additional testimony after the case had been reopened on April 11, 1945.

The Motion to reopen the trial, as appellee stated,

“in compliance with the Court’s Memorandum Decision,” very frankly and apologetically recognizes that plaintiff had been proceeding upon a wholly wrong theory. The Motion states: “Plaintiff further respectfully shows to the Court that the matter of securing a member of the Judge Advocate General Department of the United States Army Engineers who is familiar with the original prime contract referred to herein and in the Court’s Memorandum Decision and bringing such officer to Yakima as a witness is a comparatively simple matter; that the ends of justice would best be served as the present lack of ‘best evidence’ as pointed out in the Court’s Memorandum Decision may be supplied in the manner requested herein” (R. 19).

The plaintiff seeks to excuse its failure of proof for the reason that it was treading upon a comparatively strange field of evidence. It then seeks to explain and justify plaintiff’s theory with which the Trial Court disagreed in the determination of the cause in the decision of *U. S. v. Haugen*, 58 Fed. Supp. 436.

If this case had been tried to the Court and a jury and the jury had found the defendant not guilty, or at the conclusion of the plaintiff’s case as here, the Court had sustained a challenge to the sufficiency of the evidence and dismissed the case, or in the alternative had directed the jury to return a verdict of not guilty, would anyone contend under such state of facts that plaintiff

would be entitled to reopen the case for the submission of further evidence? Or, let us assume that after the submission of all the evidence by the plaintiff and defendant and after hearing argument of counsel, or without argument of counsel, the Court had then and there announced its decision in simple terms merely saying, "Under the evidence, I find the defendant not guilty." would anyone contend that plaintiff could reopen its case for the introduction of additional proof?

In the instant case, the Court did not make such a pronouncement immediately after hearing the evidence, but permitted plaintiff to submit a brief in support of its contention that defendant was guilty. Defendant also was permitted to submit a brief contending that under the evidence he was not guilty. The case was fairly and squarely submitted to the Court for decision as to the guilt or innocence of the defendant. The Court decided and announced his decision in writing to the effect that the objections of defendant to the introduction of testimony should have been sustained, and the Government had failed to prove him guilty.

The Federal Supplement according to the title page contains a report of the cases argued and determined in the District Courts of the United States and Court of Claims. The headnote to *United States vs. Haugen* as reported in 58 Fed. Supp., 436, states:

"Richard Roland Haugen was charged with pos-

sessing, publishing and uttering counterfeit meal tickets with intent to defraud the United States. Action dismissed."

Defendant earnestly contends this decision meant what it said and actually operated as a dismissal of the case. The Court took the view that because no formal order was entered, no formal dismissal was had (R. 140).

Would the action of the Trial Court have been any more binding upon the parties if the Court upon filing the decision on December 22, 1944, in the office of the Clerk of the Court had directed him to make a minute entry of dismissal upon the Journal, or if the decision had been read in open Court and the Clerk thereupon directed to make such entry? As a matter of practice when a challenge to the sufficiency of the evidence is sustained in open Court, the Judge does not, as a rule, direct the Clerk to make such entry. The Clerk is an officer of the Court and hearing the pronouncement of the Judge or reading the pronouncement of the Judge makes the entry as a matter of course.

If the plaintiff has a right to reopen its case after it has rested every time the Court points out a deficiency in the proof there would be no end to litigation. Carried to its ultimate conclusion there would be no reason why a case could not be reopened after it had been passed upon by the Appellate Court provided a motion

was made before the mandate came down on the expiration of thirty days from the filing of the opinion.

We earnestly contend that the decision of *United States vs. Haugen*, 58 Fed. Supp. 436, was a final determination of the District Court finding the defendant not guilty by reason of insufficiency of proof and dismissing the action. The fact the Court found the defendant not guilty by way of a written memorandum decision instead of an oral pronouncement, immediately after the trial of the case, certainly cannot affect the result.

The defendant, by the Court without findings of fact, has been found not guilty, because of the failure of the Government to introduce competent proof as to his guilt, and we earnestly submit that once a Court has announced such a decision, the defendant has been placed in jeopardy. The decision is final and the plaintiff cannot reopen the case to supply deficiencies of proof, especially where there is no showing of reasonable diligence in securing such proof in the first instance.

The Court in this case was the trier of both the law and facts. The Court, taking the place of the jury, found the defendant not guilty and we submit the case was at an end.

The decision in *United States vs. Haugen, supra*, is obviously correct under the evidence submitted. We

do not believe appellee will contend to the contrary, but has contended and will contend that after appellant had been found not guilty it should be permitted to reopen the case for the purpose of introducing additional evidence which the Court later held was sufficient to prove the defendant's guilt.

There are numerous decisions, the logic of which we recognize, holding that the prosecution may in the sound discretion of the Court reopen its case for the admission of additional evidence before the case has been submitted for final determination, but we find no case in which it has been held that the prosecution can reopen their case after the trial has been concluded, the matter submitted upon briefs and the case decided adversely.

The only question before the Court upon the trial of June 1, 1944, was the guilt or innocence of the defendant of the charges contained in the indictment. The Court by his written memorandum of opinion in effect found the defendant not guilty by reason of the insufficiency of the evidence. If the Court had said the same thing at the conclusion of the evidence, obviously no one would contend that defendant had not been tried.

We recognize the general rule that reopening of a trial for the introduction of further evidence after either or both sides have rested but before decision is within the sound discretion of the Trial Court and will not be disturbed except for a manifest abuse of discretion, as is illustrated in such cases as :

Lutch v. U. S., 73 Fed. (2d) 840;

Burke v. U. S., 58 Fed. (2d) 739;

Harawitz v. U. S., 12 Fed. (2d) 590;

but we earnestly contend such should not be, and is not the rule when the case has been decided adversely, and the plaintiff could by diligence have produced the evidence at the time of trial.

23 C. J. S. Sec. 1055;

U. S. ex rel. Innes v. Stimson, 52 Fed. Supp. 425, affirmed *U. S. ex rel. Innes v. Hiatt*, 141 Fed. (2d) 664.

Likewise, it has been held that a trial may be reopened where the testimony was not available until a few minutes before it was offered, such as in *U. S. v. Maggio*, 126 Fed. (2d) 155, where testimony was introduced after the argument had commenced. But in no case or text examined have we found authority to permit the plaintiff to reopen *after both sides have rested, the case has been argued, briefs submitted and an adverse decision rendered by the Court*. Clearly there was a manifest abuse of discretion.

We submit the decision of *U. S. v. Haugen*, *supra*, governs and this Court should order the case dismissed.

FORMER JEOPARDY

In this case the defendant was indicted, arraigned and pleaded, the Court heard the evidence and rendered

his decision of dismissal in writing. The question is: Under such circumstances (regardless of the right to reopen) has the defendant been in jeopardy?

The case of *McCarthy v. Zerbst*, 85 Fed. (2d) 640, holds where a case is tried to the Court without a jury, jeopardy begins after accused has been indicted and arraigned, has pleaded and the Court has begun to hear evidence, and we submit the instant case fulfills every requirement of this rule.

In 22 C. J. S. Sec. 268, p. 403, under the heading "Acquittal" it is said:

"The judgment entered by the Court after the rendition of the verdict does not control; and the failure of the Clerk to enter judgment on a verdict of acquittal does not affect its validity as a bar to subsequent prosecutions."

As authority for the above statement, which is a reprint from 16 C. J. Sec. 412, p. 256, there is cited the leading Supreme Court decision of *Ball v. U. S.*, 163 U. S. 662, 16 S. Ct. 1192, 41 L. Ed. 300.

This Court has also held minutes of the Clerk are not part of the bill of exceptions but are merely memoranda which may serve in making up the proposed bill.

Walker v. U. S., 113 Fed. (2d) 314 at 320.

One of the leading cases on the subject of jeopardy is the Ninth Circuit case of

Cornero v. U. S., 48 Fed. (2d) 69, 74 A. L. R. 797,

which states (p. 71):

“We are here dealing, however, with a fundamental right of a person accused of crime, guaranteed to him by the Constitution, and such right cannot be frittered away or abridged by general rules concerning the advancement of public justice.”

and goes on to hold that the *direction* of acquittal by the Court bars a subsequent prosecution for the same offense. If the Trial Court did not *direct* the acquittal of the appellant in the instant case in his decision, we submit there is nothing the Court could have done to make his action more convincing.

Specification of Error No. 7. There was a total failure of proof and no substantial evidence to prove the intent of the defendant to defraud the United States of America or any agency thereof (R. 45).

Specification of Error No. 8. The verdict of the Court and judgment of conviction is contrary to the law and the evidence. (R. 45).

ARGUMENT

The effect of the indictment in this case is to charge the appellant with counterfeiting, having in possession, and issuing certain meal tickets upon the Olympic Commissary Company with *intent to defraud the United States of America*.

The uncontradicted evidence of the plaintiff (the defendant offered no evidence) tended to show that defendant caused to be printed certain counterfeit meal tickets and it may be inferred that in so doing he had an intent to defraud *someone*, but he is charged with the offense of intending to defraud the United States of America by making, forging, counterfeiting, uttering, publishing and possessing obligations and other writings of the United States. There was no evidence introduced that defendant forged, counterfeited or uttered anything except some meal tickets upon the Olympic Commissary Company, an Illinois Corporation, what at the time was engaged in purveying and supplying food to the workmen on the Hanford Project. These tickets do not purport upon their face to be writings of the United States. Plaintiff's Exhibit "A" (R. 186). There was not a scintilla of evidence introduced in anywise tending to show the defendant knew they were writings of the United States, if, in fact, they were such.

The statutes in this case are plain and unambiguous (Section 72-73, Title 18, U. S. C. A.), and the burden under the statutes is upon the United States of America to prove that defendant did forge, counterfeit and utter these tickets with the *intent to defraud the United States*.

The Trial Court brushed aside this contention as follows:

“It is equally clear he had the intention of defrauding the Olympic Commissary Company. Now that is the intent which is necessary. It is not necessary for him to know that the Olympic Commissary Company was an agency of the United States. The Olympic Commissary Company just happened to be an agency of the United States, and he intended to defraud this concern, which at that time and under those circumstances was an agency of the United States” (R. 181-182).

It must be conceded, we believe, by the appellee that appellant had no knowledge directly or indirectly that Olympic Commissary Company was an agency of the United States. The contracts were highly secret, so secret, in fact, that even Government Counsel and the Court were unaware that such contracts existed, their contents, who signed them in behalf of the contracting parties, or any other fact in connection therewith.

Counsel for the Government in the opening statement of the trial of June 14, 1944, stated:

“We will show by pictures the types of signs placed about the commissary, in which the statement is made that all food and equipment used in the building are the property of the Government, and any taking away of property would be prosecuted.

“We will show further that these signs, in conjunction with that, appear at places all the way through the project, at the entrance within the project, and in conjunction with the mess halls, which say ‘This is a Federal project, and the prop-

erty thereon is the property of the Government,' as a matter of notice to the defendant, and we will show at the time he purchased this meal ticket he knew the procedure involved, and knew how the meal tickets were purchased, from the fact of his own experience at the project, and from these signs, and his intention was at the time to defraud the Government by the use of these tickets, and he actually perpetrated the fraud in the sale of these tickets to the individuals named." (R. 53-54)

At the trial of October 5, 1944, certain of these pictures were admitted in evidence as plaintiff's exhibits "N," "O," and "P." The Government offered a series of pictures of which the Court rejected five and admitted three (R. 100). If the contention is that these pictures constituted notice to defendant that all property was the property of the Federal Government, then we submit where is the proof that these signs were in place at the time of the alleged commission of this offense by defendant on April 19, 1944? There is no evidence except the statement of the witness Piper: "It is a photograph of the sign which appears on the Hanford Reservation, a picture of the sign" (R. 100).

There is no further reference in the testimony of this witness or any other witness as to when the sign was put up, who put it up, and by what authority it was put up, and certainly no evidence that defendant saw or should have seen the sign in the absence of direct proof that it was in place on and prior to April 19, 1944.

If the Government is relying upon Exhibits "N,"

“O” and “P” to prove knowledge on the part of defendant that the Olympic Commissary Company was an agency of the United States, and therefore when he had counterfeit tickets printed and in his possession of the Olympic Commissary Company, he was in effect defrauding the United States, then we submit there was an utter failure of proper proof to justify the admission of these exhibits in evidence against defendant.

The question in this case is whether this Court will extend the rule of *Johnson v. Warden*, 134 Fed. (2) 166. In the *Johnson* case this Court held a forged physician's prescription for narcotics would fall within the meaning of the phrase “other writing,” as used in Sec. 72, 73, 18 U. S. C. A. This holding was based upon the proposition that it was not necessary to prove the Government would suffer pecuniary loss. If the alleged unlawful activity be engaged in for the purpose of frustrating the administration of a statute or if it tended to impair a Governmental function it was sufficient. As pointed out in the *Johnson* case it is made unlawful by Federal statute to sell or otherwise dispose of narcotic drugs except under certain conditions, one of which is by prescription of a registered physician, dentist, or veterinarian.

That the traffic in narcotics has long been a subject of Federal legislation is a matter of common knowledge. The average school boy has heard of the Harrison

narcotics act. Clearly this Court was correct in holding the utterance of a forged prescription for narcotics tended directly to frustrate the laws of the United States relating to narcotics.

In *United States v. Mullin* (D. C. Mo.) 51 Fed Supp. 785, the Court held the forging and possessing of gasoline rationing coupons was included in the words, "other writing," within the statute in question. The decision points out the well known fact that the Government, shortly after the outbreak of the war, undertook the regulation of the consumption of gasoline by the civilian population through the medium of the O. P. A. Such fact was known to everyone, whether they owned an automobile or not. The Court properly held that those who forge or have in possession forged gas coupons with the purpose of procuring gasoline were frustrating the administration of a statute and impairing the functions of Government. See also *United States v. Raskin*, 52 Fed. Supp. 343.

In all of the earlier cases such as *United States v. Goldsmith*, 68 Fed. (2) 5 (involving a forged receipt for the payment of taxes by a person impersonating a Federal employee) *Goldsmith v. United States*, 42 Fed. (2) 133 (involving forged letters to an American Consul to induce him to issue a visa), and *United States v. Tynan*, 6 Fed. (2) 668 (involving the possession of a forged prescription for intoxicating liquor contrary

to the National Prohibition Act) a statute or general criminal law of the United States was directly involved, as was the internal revenue act as applied to narcotics in the *Johnson* case, *supra*.

In the instant case there is nothing in the Olympic Commissary Company meal ticket that shows it had any connection with the United States. In none of the cases which have come to appellant's attention is it held that the words "other writing" embrace acts not connected with the violation of some Federal statute. For aught anyone knew (at the date of this indictment) the E. I. du Pont de Nemours Company were engaged in building a plant at Hanford. The matter was handled exclusively and secretly by the War Department. No public statute was involved. The project was not undertaken pursuant to any special or general act of Congress. The Olympic Commissary Company was a large midwestern corporation engaged in food handling for a profit. In what way could it be known the Federal Government was in any way involved? Under such circumstances how could the penal provisions of the statute (18 U. S. C. A. 72, 73) be extended to include a meal ticket in the name of a private corporation where the purpose must be to defraud the United States? After all, in order for defendant to intend to defraud the United States he must know that the administration of a statute or a function of Government is in-

volved. We submit the record in this case discloses a total failure of proof upon that point.

The case of *Head v. Hinton*, 141 Fed. (2) 449, states:

“But the obvious purpose of Section 28 of the Criminal Code (18 U. S. C. A. Sec. 72) is to protect the Government against the forging, altering, or counterfeiting of documents, records, or ‘other writing’ which have some direct connection with the administration of governmental functions or activities, *Cross v. North Carolina*, 132 U. S. 131, 10 St. Ct. 47, 33 L. Ed. 287, and consistent with that purpose makes use of the words ‘other writing’ to denote the comprehensive scope of the legislation.’

Again we submit, is there any proof that the alleged counterfeit meal tickets had any *direct connection* with the administration of Governmental functions and activities? No known officer or agent of the United States was involved. Clearly sections 28 and 29 of the Criminal Code (Secs. 72, 73, Title 18, U. S. C. A.) should not be extended to cover the possession and counterfeiting of meal tickets of a private corporation which, if an agent of the United States at all, is such agent in a very indirect and limited degree, and that only by virtue of a secret contract not introduced in evidence.

Specification of Error No. 2. The District Court erred in admitting over the objection of defendant

hearsay evidence as to the contents of the contract between the United States of America and E. I. duPont deNemours & Company and the sub-contract between the duPont Company and Olympic Commissary Company, the contract being the best evidence, as follows:

“Q. First I wish to ask you some general questions. Who is the company that is doing the construction work at Hanford?

Mr. Sandvig: If he knows of his own personal knowledge.

Mr. Erickson: He is in charge of the construction.

A. Am I to answer if I know it of my own personal knowledge or official?

Mr. Sandvig: Of your own personal knowledge.

Q. If you know it officially.

Mr. Sandvig: No; of his own personal knowledge.

A. The E. I. duPont deNemours Company.

Q. The E. I. duPont deNemours Company is building the project at Hanford?

A. They are the prime contractor.

Q. By prime contractor you mean they have the contract with the United States government?

Mr. Sandvig: I object as not the best evidence. If there is a contract between the duPont Company and the United States, the contract itself is the best evidence.

The Court: I am inclined to agree with you, but I will let him answer and allow an exception, and I may later strike out the answer. I don't know yet.

(Question read by reporter.))

A. Yes.

Q. Now the contract with the E. I. duPont de Nemours Company has with the United States, is that a public contract, or otherwise?

Mr. Sandvig: May it be understood, Your Honor, without bothering the Court all the time, that I am objecting to all of this?

The Court: It is all subject to your objection, and an exception is allowed.

A. The contract is a secret contract.

Q. By whose orders is it a secret contract?

A. By the War Department.

Q. And you have——

The Court: Wouldn't that be a thing which——

Mr. Sandvig: I am taking it for granted my objection goes to all of this.

The Court: The Secretary of War would issue some sort of an order, would he not?

Mr. Sandvig: Yes, sure.

The Court: That it would be secret?

Mr. Erickson: I will establish that, I think.

The Court: All right.

Mr. Sandvig: The order itself would be the best evidence. That is like me saying what the statute is.

The Court: Go ahead, Mr. Erickson.

Q. Did the War Department, or who in the War Department issued that order?

Mr. Sandvig: If you know of your own personal knowledge.

A. The order came to my commanding officer from the office of the Chief of Engineers.

Mr. Sandvig: I make the same objection.

The Court: It is all being admitted subject to your objection.

Mr. Sandvig: I am afraid I will slip up on something.

The Court: You are not going to slip up on anything. You have your objection. It does seem to me, Mr. Erickson, that the order making it secret is something that could be produced.

Q. (Mr. Erickson): Is that something that can be produced?

A. I am not sure it was not a verbal order.

Q. Whom did you receive instructions from that the contract was secret?

A. I received verbal instructions from the office of the Chief of Engineers.

Q. And who in that office?

Mr. Sandvig: Subject to my objection.

Q. From whom in that office did you receive the instructions?

Q. I received instructions that individual's name was not to be brought into a public hearing.

The Court: What justification could there be for concealing from the public an order which says that the contract is to be secret? He says he has orders to keep secret who gave the order." (R. 102-5)

Specification of Error No. 3. The District Court erred in permitting the plaintiff to introduce over objection oral secondary evidence as to the legal effect and contents of said contract, particularly between the duPont Company and Olympic Commissary Company, said subcontract being the best evidence, as follows:

"A. The E. I. duPont deNemours Company have a cost-plus fixed-fee contract with the government.

Q. Explain so we can understand——

Mr. Sandvig: The contract itself is the best evidence.

The Court: Yes; this all goes in over your objection." (R. 108)

Specification of Error No. 6. The District Court erred in admitting in evidence additional hearsay testimony relating to the contract between the United States of America and the duPont Company after such reopening, as follows:

“Q. Now directing your attention to the original contract between the United States Government and the E. I. duPont deNemours Company, what provision is made in that contract about property used in the prosecution of the work on the Hanford Engineer Works?

Mr. Sandvig: I object to that as not being the best evidence. The witness has the contract before him. They have opened the doors now, and the contract is no doubt admissible. He has been using it for evidence, and certainly the contract is the best evidence. No matter how good a lawyer he may be, we might disagree on its interpretation. The contract itself is the best evidence.

The Court: The objection is overruled.” (R. 148-9)

ARGUMENT

The above three specifications are assigned as error and directed against the reception in evidence of oral testimony of witnesses as to the contents and legal effect of contracts which were not introduced in evidence for the reason the contracts had been directed by the War Department to be kept secret, it being the contention of the appellant the contracts themselves were the best evidence. The Trial Court has fully discussed this phase of the case in the written decision (R. 9-18).

In this opinion the Trial Court held the best evidence in the power of the party to furnish must be produced and the plaintiff had failed to do so by the testimony of Major Ebbs. Although not cited in the opinion,

this ruling is sound and is in line with the Ninth Circuit case of *Schreve v. U. S.*, 103 Fed. (2d) 796. After the order permitting the reopening, this deficiency was supplied, *to the satisfaction of the Trial Court*, by the testimony of Lt. Col. Cornell as indicated in the Trial Court's oral decision (R. 176-184).

Without in any manner waiving our argument under specifications of Error 4, 5 and 7, the appellant challenges the sufficiency of Lt. Col. Cornell's testimony, taken as a whole, to justify the conclusion of the Trial Court or to in any manner change the conclusion reached in the decision of *U. S. v. Haugen*, 58 Fed. Supp. 436.

It appears from the testimony of this witness the Olympic Commissary Company is a corporation organized under the laws of the State of Illinois, although no proof of such was offered other than the oral statement of Lt. Col. Cornell (R. 166).

The contract between E. I. duPont deNemours Company was not offered in evidence although frequently requested by defendant, nor was the prime contract between the duPont Company and the Government.

Lt. Col. Cornell testified that as Chief of the Legal Staff of the Manhattan District he had charge of the supervision and drafting of the contract for the construction of the Hanford Engineer Works (R. 141); that such contract was secret (R. 143), as was the con-

tract between the duPont Company and Olympic Commissary Company (R. 144). The witness had the contract before him while testifying, and although he had himself drawn and prepared the contract on behalf of one of the contracting parties he was permitted to testify as to his interpretation of its provisions (R. 149).

After some discussion as to whether or not the defendant was to be convicted upon the conclusions of this witness, the Court was permitted to examine the contract between the duPont Company and Olympic Commissary Company in chambers. The contract was not marked as an exhibit nor offered in evidence for the inspection of the defendant or his counsel.

We submit that plaintiff having thus opened the door should have been compelled by the Court to offer the contract in evidence, in order that the Appellate Court in event of the conviction of defendant would have the opportunity to read said contract. This is only simple justice to the end that a proper ascertainment could be made by the Appellate Court as to the correctness of the interpretation of the provisions and the conclusions reached by the witness and the Court.

It developed in Lt. Col. Cornell's testimony that while the original contract between the United States and duPont Company was secret, the sub-contract between duPont Company and Olympic Commissary Company were merely restricted.

“Q. (Mr. Sandvig): The other one is merely a restricted contract, available to any employee of the United States?

A. That is right.

Q. There would be an objection to me seeing that?

A. In its entirety. I would be very glad to show you any of the administrative portions, relating to this particular thing.

Q. It would be hard for me to get at it, but you will let the Court take it to his chambers?

A. Yes, sir.” (R. 160)

If, as stated by the witness, this contract is available to any employee of the United States, why was it not offered in evidence so the Appellate Court could read it and place the Court’s own interpretation upon it?

The grounds for the admission of secondary evidence are that the primary evidence has been lost or destroyed or is otherwise inaccessible (22 C. J. S. Sec. 706, p. 1196). However, before secondary evidence is admissible, the competency and genuineness of the primary evidence must be established and a proper foundation must be laid by establishing by satisfactory and sufficient proof that the primary evidence cannot be produced.

Schreve v. U. S., 103 Fed. (2d) 796;

Hass v. U. S., 93 Fed. (2d) 427;

Hartzell v. U. S., 72 Fed. (2d) 559.

We submit a reading of the record demonstrates there was no good and sufficient reason why the contract between duPont Company and Olympic Commissary Company was not offered in evidence and that defendant's objections on account of such failure are well taken.

CONCLUSION

Although eschewing any doubt plainly the Trial Judge was anything but confident after hearing the additional testimony following the reopening of the case that he had reached the right conclusion.

In the Court's oral decision, he declared :

"The Court: I am in full accord with Mr. Sandvig's statement that this case is unique. It is unique in practically all of its phases, and because it is unique, and several questions have arisen which are practically questions of first impression, so far as any court is concerned, without in any way indicating any doubt in my own mind as to the correctness of the conclusions I have reached, I will say that I hope the defendant is able and willing to prosecute an appeal in this case, and if he does I will fix the bond in an amount which will enable him to appeal and remain at liberty."

We agree with the Trial Court's conclusion that this is a unique case and many of the questions presented are of first impression, but summarizing and briefly restating appellant's position, we find :

1. The appellant was tried on October 5, 1944, upon a valid indictment by a Court of competent jurisdiction, without a jury, the evidence was closed, the Court determined the plaintiff had failed in its proof, the case must be dismissed, and such determination ended the case, and to put the defendant again upon trial placed him in jeopardy and was prejudicial to his constitutional rights.

2. There was a total failure of evidence to prove the intent of the defendant to defraud the United States, the burden of proving which rested at all times upon the plaintiff.

3. The appellant was convicted upon secondary evidence, conclusions and hearsay when the primary evidence was readily available.

4. In this case the verdict of the Court and Judgment of Conviction is contrary to the law and evidence and should be reversed.

Respectfully submitted,

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ROBERTSON & SMITH,

By *Del Cary Smith*
DEL CARY SMITH, Jr.,

Attorneys for Appellant.

NO. 11,063

IN THE

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

RICHARD ROLAND HAUGEN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

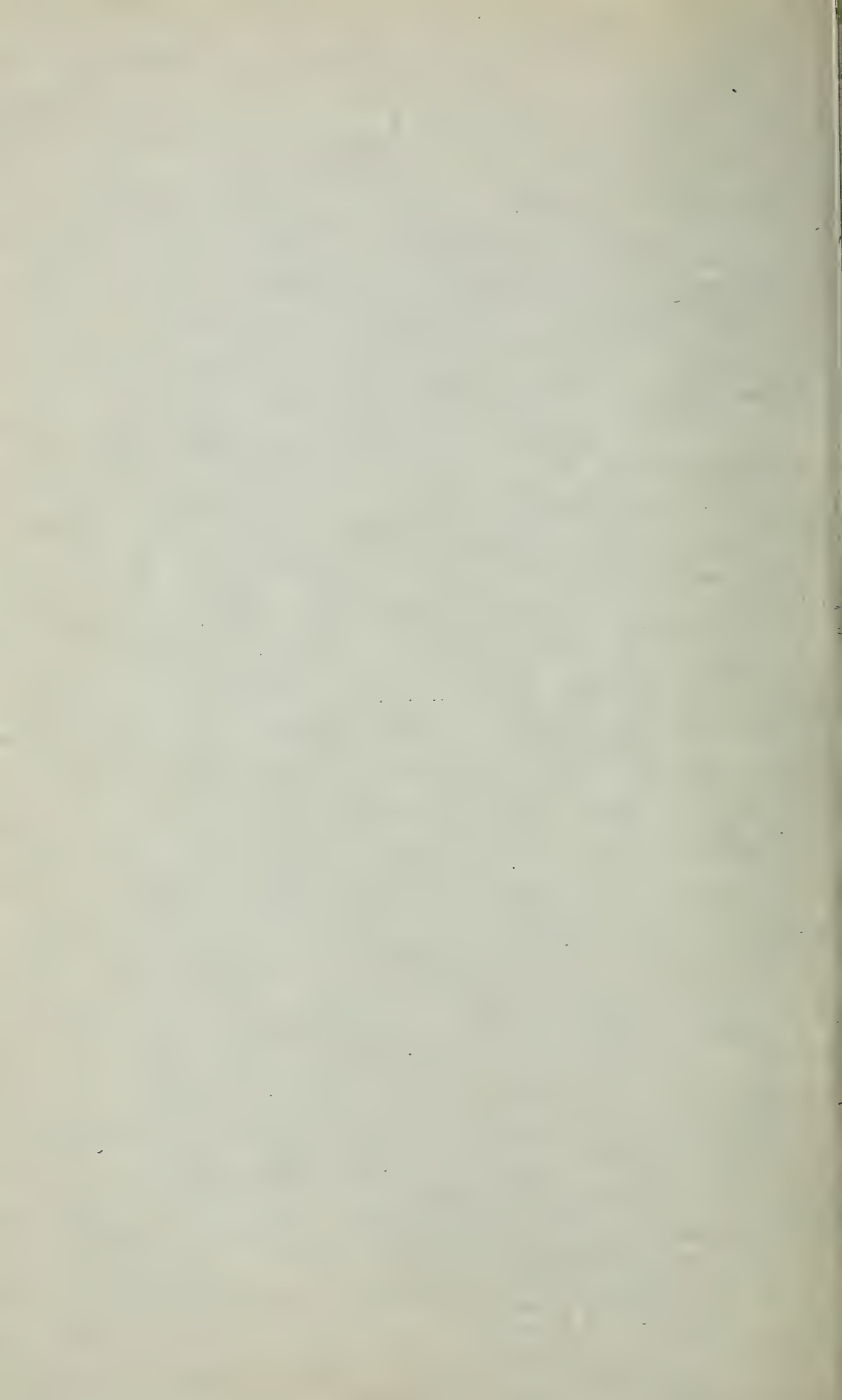
On Appeal From the District Court of the United
States for the Eastern District of Washington

BRIEF FOR THE APPELLEE

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BRIEF FOR THE APPELLEE

STATEMENT OF JURISDICTION

The Circuit Court of Appeals has jurisdiction of the instant case under the provisions of Title 28, Section 41 (2) U. S. C. A. and Title 18, Section 73, U. S. C. A.

STATEMENT OF THE CASE

The appellant, RICHARD ROLAND HAUGEN, was charged by indictment containing three counts with possessing, publishing and uttering counterfeit meal tickets with intent to defraud the Olympic Commissary Company, an agent of the United States of America, in violation of Title 18, Section 73, U. S. C. A. It was further charged that the meal tickets referred to were spurious forgeries of original meal tickets issued by the Olympic Commissary Company, a corporation, which was alleged to be an agency of the United States of America, charged with the duty of furnishing meals to workmen employed upon a defense project being conducted by the United States Army Engineer Corps at Hanford, Washington. (This is the project where the atomic bomb was manufactured.)

The case was tried before the court, sitting without a jury. The evidence introduced by the government, and undisputed by the defendant, demonstrated:

1. That the United States Army Engineers instituted the construction of a vast manufacturing project in the south central portion of the State of Washington, following condemnation of approximately 400,000 acres of land to be used for this purpose;

2. That in carrying out this project, they enlisted the assistance of two agents:

- (a) The E. I. duPont de Nemours Company, a corporation,
- (b) The Olympic Commissary Company, a corporation.

Evidence was introduced to show that the duPont Company, as it will be referred to herein, received a fixed fee of \$1.00 for constructing all of the manufacturing plants and buildings and installing all of the equipment necessary for the work to be carried on, known as the Hanford Engineers Project; that the United States Government supplied all of the money constituting the cost and expense of construction and operation of this project; that the United States Army Engineers, under the terms of their agency contract with the duPont Company and the Olympic Commissary Company, supervised all of the purchases made by each of its agents, supervised the inspection of all property and equipment purchased by each of its agents, and kept and maintained a revolving fund in banks, subject to check withdrawals by the duPont Company, from which funds all of the costs and expenses of construction of the plants referred to were defrayed. (T. of R. 101-128, 130, 135, 139, 166-172.) Exhibits Q. (T. of R. 192); R (T. of R. 255); S (T. of R. 260); T (T. of R. 268).

The trial judge fully recognized that the duPont Company and the Olympic Commissary Company were mere agents of the United States in the construction, development and maintenance of chemical and manufacturing plants on the Hanford Project.

(T. of R. 179, 180, 181.) Neither the appellant nor anyone in his behalf has contended to the contrary. Neither of the agencies had any of the powers of an independent contractor, as was aptly pointed out in the testimony by Lt. Col. Ralph G. Cornell. (T. of R. 139-166.) The United States Government not only paid for the entire cost of construction and operation, item by item, as expended by the duPont Company and Olympic Commissary Company, but supervised, controlled and inspected every phase of the work and every article of merchandise that was purchased for the construction and operation of the project. Title to all purchases made on the project by these agents, vested in the United States immediately upon delivery. (T. of R. 116, 117, 257.)

On June 14, 1944, the defendant and government, having waived jury trial, the cause came on for hearing before the Honorable Lewis B. Schwollenbach, Judge. R. Max Etter, Assistant United States Attorney, represented the Government. He made a very thorough and extended opening statement, pointing out the various elements of proof which the Government would present, at the conclusion of which defendant's counsel moved for a dismissal upon the matters stated in the opening statement, and, to quote him, "and for the further and additional reason that the indictment or any counts thereof do not state facts sufficient to constitute a crime." (T. of R. 54.) The trial judge denied the motion for dismissal on the opening statement, but considered the oral demurrer of the defendant's counsel to the in-

dictment as well taken and entered an order sustaining such oral demurrer, holding that the indictment did not state facts sufficient to charge a crime in any of its counts.

Thereafter a second indictment was returned by the Grand Jury against the defendant, charging the same offenses which had been alleged in the three counts of the original indictment but alleging with a higher degree of strictness the facts upon which the violations were predicated. This cause then came on for hearing before the court sitting without a jury, the defendant and the government again having waived trial by jury. At this trial, Major R. F. Ebbs testified for the Government respecting portions of the contract entered into between the United States of America and the E. I. duPont de Nemours Company, by the terms of which the latter corporation became the agent of the government for the construction of the Hanford Project. He testified that the contract was secret under Order of the Department of War (T. of R. 103, 104) and that it could not be produced in court or made public property in any sense, or its entire contents revealed even to the Judge of the Court or other public officials (T. of R. 105). He likewise testified in similar fashion concerning the contract between the duPont Company and the Olympic Commissary Company, by the terms of which the latter corporation became an agent of the government for the performance of certain functions at the Hanford Project, one of which was the furnishing of meals for the vast army of workmen

who were recruited throughout the country and employed at that place (T. of R. 105-130). The matter of the defendant having secured the counterfeit meal tickets from a printer in Tacoma, the selling of them by him to certain employees on the Hanford Project, the possession of 966 spurious meal tickets by him in his hotel room at Yakima at the time of his arrest, were all detailed without contradiction by the defendant, personally, or through any witness (T. of R. 69, 72, 76, 78, 84, 94-101, 167).

The Court took the entire case under advisement instead of rendering an immediate opinion following completion of testimony and argument. In his memorandum opinion (T. of R. 9), 58 Fed. Supp. 436, the Court held that the army officer had a right to refuse to disclose confidential information and that because of the war emergency and stress of the times, the government had a right to offer secondary evidence of the pertinent portions of the contract existing between the United States of America, the duPont Company and the Olympic Commissary Company, but the Court, discrediting the testimony of Major Ebbs that he had a certified copy of the contract in his office as Area Engineer of the Hanford Project and was testifying from that certified copy rather than from the original, which the witness stated he had never seen, ruled that the government had not presented the *best* secondary evidence available and held that the duty had devolved upon the government to furnish the best secondary evidence available under the circumstances, which would have

been the oral testimony of a trained lawyer or legal officer of the Army who had read and was familiar with the *original* contract between the United States and the duPont Company for construction of the Hanford Project. From this the Court concluded that he should have sustained objection to the introduction of Major Ebb's testimony; that he should in deciding the guilt or innocence of the defendant, discredit the Major's testimony, and thus was forced to the conclusion that the government had failed to sustain the burden that the Olympic Commissary Company was an agency of the United States. (T. of R. 9).

Immediately upon filing of this opinion, the United States Attorney served and filed a motion for an order permitting the reopening of the cause for the purpose of supplying that type of secondary evidence relating to the agency contracts between the Olympic Commissary Company, the duPont Company and the United States of America, which the Court in its rather technical ruling had held to be absent in Major Ebb's testimony. This motion was granted; an order permitting the reopening of the cause for the purpose stated was entered (T. of R. 23, 24) and hearing was had at which Lt. Col. Ralph G. Cornell testified (T. of R. 139.) This witness testified he was legal advisor to the Chief Engineer of the United States Army at Washington, D. C.; that his particular specialty was contracts, claim matters and general legal problems; that he held the commission of Lieutenant Colonel in the United States Army; that he had charge of the negotiations of the Hanford

Project contract between the United States Army and E. I. duPont de Nemours Company, and that he had charge of the drafting of the original contract and was familiar with its terms. He then delineated its terms insofar as they related to the relationship of the agency existing between the United States Army, the duPont Company and the Olympic Commissary Company, (T. of R. 141-166.) With this evidence before the Court, a finding of guilt was immediately entered and the defendant was sentenced and adjudged guilty. Following entry of judgment and sentence, this appeal was taken.

APPELLANT'S ASSIGNMENT OF ERROR

The assignments of error on appeal may be resolved as follows:

1. The Court erred in permitting the trial upon the second indictment returned by the Grand Jury against the defendant, for the reason that jeopardy had attached to the original hearing when the defendant's counsel moved for dismissal on the opening statement and proposed oral demurrer to the indictment.

2. The court erred in admitting testimony of a secondary character relating to the contract of agency existing between the United States of America and E. I. duPont de Nemours Company, and the duPont Company and the Olympic Commissary Company, without requiring the production of such contracts in their original form.

3. The court erred in entering an order permitting reopening of the cause in the taking of testimony of Lt. Col. Cornell after the court had filed a memorandum decision holding that the cause must be dismissed.

4. That the proof submitted by the government was not sufficient to show that the defendant, by his act of possessing and uttering counterfeit Olympic Commissary Company meal tickets, intended to defraud the United States.

ARGUMENT

I. Discussion of Appellant's First Assignment of Error, viz., That He Had Been Twice Placed in Jeopardy.

Jeopardy did not attach at the original hearing for the reason that the indictment was insufficient to charge a crime and was so contended by defendant's counsel and so held by the court. One of the essential elements to a claim of former jeopardy is that the defendant is being tried in a court of competent jurisdiction upon a valid indictment or complaint and that a witness had been called and sworn to testify.

No point is here urged upon the technical ground that no witness had yet been called when defendant's counsel interposed his oral demurrer to the indictment, though that claim could with justification be made under the federal system where the common law rule obtains. Here the government contends that since the indictment was invalid, jeopardy did not attach. This rule is fundamental in criminal law. The following cases so held:

United States v. Agresti, 39 Fed Supp. 16, 130 F. (2d) 152;

Wolkoff v. United States, 84 F. (2d) 17;

Amire v. Tines, 131 F. (2d) 827.

United States v. Jones, 31 Fed. 725.

No rule of procedure permits a defendant to wait until a trial starts to interpose his demurrer challenging the validity of an indictment, securing a successful ruling thereof, and blocking further prosecution upon a valid indictment upon a plea of former jeopardy. The two claims are wholly illogical and inconsistent and lead to a conclusion which is nothing more than a legal absurdity. There can be no jeopardy without a valid charge. No defendant can claim an invalid charge, and after being successful in such claim, set up jeopardy on the theory that the charge which he claimed was invalid has suddenly for his purposes become valid.

II. Discussion of Appellant's Second Assignment of Error, viz., That Secondary Evidence of the Agency Contracts Between the United States, the duPont Company and Olympic Commissary Company was Inadmissible.

The court will now take judicial notice of the fact that the atomic bomb was developed and manufactured on the Hanford Project and used in warfare under the most stringent veil of secrecy so far revealed in military history. In order to accomplish this end it was necessary that no phase of the work at Hanford become public property either through public court records or otherwise. The Second War Powers Act which gave the President and the Secretary of War under the President authority to do all the things necessary to defend the nation and wage war, provided in its applicable portion as follows:

"The President shall not publish or disclose any information obtained under this Paragraph which the President deems confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless the President determines that the withholding thereof is contrary to the interest of the national defense and security; and anyone violating this provision shall be guilty of a felony, and upon conviction thereof shall be fined not exceeding \$1000 or be imprisoned not exceeding two years or both." (Title 50, Sections 632, 633 (4) U. S. C. A.)

An Army regulation, which has the force of law as held in *United States v. Johnson*, 316 U. S. 481, provides, Section 380-5, Paragraph 5, as follows:

"Secret Material—Dockets, information or material the unauthorized disclosure of which would endanger national security, cause serious injury to the interests or prestige of the nation, or any government activity thereof, or would be of great advantage to a foreign nation, shall be classified secret."

The contracts between the United States Army and the duPont Company and the Olympic Commissary Company were respectively classified as secret and restricted (T. of R. 101-128, 139-166). Therefore, these contracts could not be offered in evidence. Accordingly, secondary evidence concerning their applicable portions to the issues before the Court became admissible. That this is the rule is well established.

Wigmore on Evidence, 3rd Ed., Sec. 2378;

In re Grove, 180 Fed. 62. C. C. A. 3;

Firth Sterling Steel Company v. Bethlehem Steel Company, 199 Fed. 353.

The trial judge collected all the authorities on this question in his very excellent opinion in the above captioned case, to be found at 58 Fed. Supp. 436. The government has no quarrel with the trial court holding with strict technical exactness that the certified copy of the prime contract in possession of Major Ebbs did not, under the Shop Book Rule of Evidence, Title 28, Section 695, U.S.C.A., constitute a proper basis for Major Ebbs' oral interpretation of the terms of that contract. It was an authenticated copy of the original contract, possessed by Major Ebbs, in the regular course of business under the authority of the highest military officer in the government, the Secretary of War. The writer's personal view is that Major Ebbs' testimony, interpreting this authenticated copy then in his possession, came within the Shop Book Rule and was in itself a competent basis for Major Ebbs' oral testimony (T. of R. 122). However, the government complied with Judge Schwellenbach's ruling on the point of evidence, though its attorneys had no way of knowing that the evidence was objectionable until Judge Schwellenbach's opinion was filed.

III. Discussion of Appellant's Third Assignment of Error, viz., That the Court's Memorandum Decision was a Final Judgment of Dismissal.

The appellant has assigned the reopening of the cause as error.

Appellee's motion to reopen the cause, for the purpose of supplying evidence held to be lacking by the Court's opinion, was promptly made, at a time when the Court was not in session and before judgment, either oral or written, had been entered upon the memorandum opinion. The matter of reopening a criminal case for reception of further evidence before the entry of judgment, either of dismissal or guilt, is one which lies without the sound discretion of the Court. Rules of Criminal Procedure for District Courts (Title 18, Section 688 U. S. C. A.) provides that a judgment shall be imposed by the court if there be:

- (a) A plea of guilt
- (b) A verdict of guilty by the jury, or
- (c) Finding of guilt by the trial court where a jury is waived.

At best, the Court's memorandum opinion was merely the Court's then opinion on the legal questions raised during the course of the trial, and was not final. Before judgment the Court could have amended or modified its terms.

People v. Grana, 36 Pac. (2d) 375 (Calif.); also 29 Pac. (2d) 461, *City of Norwich*, 274 Fed. 374;

Rogers v. Hill, 289 U. S. 582, page 587;

McGhee v. Leitner, 41 Fed. Supp. 674;

Rothschild and Company v. Marshall, 44 F. (2d) 546, page 548;

First National Bank of Graham v. Weitzel, 239 Fed. 497;

Lahman v. Burnes National Bank, 20 F. (2d) 897, page 899.

See also: *Uhl v. Dalton* (C.C.A. 9) Filed October 25, 1945 (opinion by Justice Mathews).

IV. Discussion of Appellant's Fourth Assignment of Error, viz., That the Proof Submitted By the Government Was Not Sufficient To Show that the Defendant, By His Act of Possessing and Uttering Counterfeit Olympic Commissary Company Meal Tickets Intended to Defraud the United States.

The statute under which appellant was charged in its applicable portion recites as follows:

"Whoever shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, * * * any deed, power of attorney, order certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabeling any other person, either directly or indirectly, to obtain or receive from the United States, *or any of their officers or agents*, any sum of money; or whoever shall utter or publish as true, or cause to be uttered or published as true, any such false, forged, altered, or counterfeited deed, power of attorney, order, certificate, receipt, contract, or other writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; * * * shall be fined * * *." (Title 18, Sec. 73, U.S.C.A.)

The Court found, from the evidence presented by

the government, that the Olympic Commissary Company was an agent of the United States. His exact language was:

“Under that testimony I believe that the Government has proved that the Olympic Commissary Company was an agency of the United States. Agencies of the United States are necessarily limited in their power to bind the United States. I doubt whether the United States Government can enter into a general agency agreement and give to any individual or corporation the same broad powers as an agent which an individual can, but the courts have recognized for a long time it is possible for the Government to establish individuals or corporations as its agent.

Here we have an agency agreement with the du Pont company, which gave to the du Pont company the right, subject to strict supervision and control, and to the further restriction of approval, before such subagency could be created.

Under this contract a revolving fund was set up. I do not think even the du Pont company or the Olympic Commissary Company would have the broad power of agency under the du Pont contract, as has been explained to us by the witness, or the Olympic Commissary Company contract, to bind the United States Government for everything (146) that they might try to do. They certainly have the power to bind the Government in so far as the operation of this business is concerned, and in so far as the funds which were established by the United States for this business by the original contract and the subcontract are concerned.” (T. of R. 179-180)

This excerpt from the Court's oral decision at the conclusion of the case is set forth for the purpose of emphasizing the careful study and attention which

the trial Judge gave to this very important phase of the case.

Since the Olympic Commissary Company was an agency of the United States for the construction of a military plant at Hanford, Washington, any fraud imposed upon it comes within the statute. The trial judge was most consistent in his reasoning when he said:

“That brings us to the next question, whether or not there was any intent upon the defendant’s part to defraud an agency of the United States.

Every individual is presumed to know the consequences of his acts, and to intend to do those things which he does do. There can be no doubt under the testimony here that when this defendant had these commissary tickets printed in the form they were, and made the use of them he did, that he intended to defraud somebody. He had the intent to defraud.

It is equally clear he had the intention of defrauding the Olympic Commissary Company. Now that is the intent which is necessary. It is not necessary for him to know that the Olympic Commissary Company was an agency of the United States. The Olympic Commissary Company just happened to be an agency of the United States, and he intended to defraud this concern, which at that time and under those circumstances *was an agency of the United States*. It seems to me clear he did it with the intent, the clear intent, to defraud this agency of the United States, and as a result of his acts he did defraud, to the extent that the tickets were passed, and he was defrauding the United States.” (Italics supplied) (T. of R. 181-182)

In discussing a similar prosecution under Sec. 72 of the Act, Judge Moscowitz of the Eastern District of New York stated:

“It is the defendant’s contention that he had no intention of defrauding the United States in forging these prescriptions and uttering the same. He admits that the prescriptions were filled by a druggist and that he received the narcotic drugs. The crime is complete. The law infers the intent to defraud from the defendant’s acts.” (*United States v. Hall*, 58 Fed. Supp. 773)

He then cites the case of *U. S. v. Tynan*, 6 F. (2d) 668 and many cases cited therein and concludes his opinion with the following language:

“The defendant will not be permitted to testify that he did not intend to defraud the United States when his admitted acts constituted such defrauding.”

It is not necessary, however, to look beyond the decisions of this Ninth Circuit Court for authority supporting Judge Schwellenbach’s observations in the instant case. In *Johnson v. Warden*, 134 F. (2d) 166, this Court stated:

“We entertain no doubt that a forged physician’s prescription for narcotics falls within the meaning of the phrase “other writing” as used in that statute. It was said in *Prussian v. United States*, 282 U. S. 675, 51 S. Ct. 223, 75 L. Ed. 610, that the words “other writing” as used in a companion statute, Sec. 29 of the Criminal Code, 18 U.S.C.A. Sec. 73, were included for the purpose of extending the penal provisions of the statute to all writings of every class if forged for the purpose of defrauding the United States.”

This Court also held in the same opinion that:

“It is enough that the unlawful activity be engaged in for the purpose of frustrating the administration of a statute, or that it tends to impair a governmental function.”

In *United States v. Houghton*, 14 Fed. 544, the Court used the following language:

“The rule here is, as stated by the best authorities, that if a man intends to do what he is conscious the law, which every one is presumed to know, forbids, there need not be any other evil intent shown. In such a case the law infers the intent to defraud from the act. If you are convinced that the defendant knew the false character of the payroll when he transmitted it to the government, you are not obliged to look further than that to find a fraudulent intent on the part of the defendant.”

In the same connection the case of *United States ex rel Marcus v. Hess*, 317 U. S. 537 should be read. This was a *qui tam* or informer action brought in the name of the United States on behalf of the informer who alleged fraudulent collusion among contractors who were performing services for the Public Works Administration and who specifically were charged with defrauding the United States Government by collusive bidding on the project resulting in the presentation of false claims to the United States Government. The Supreme Court held that it was not necessary to prove a contractual relationship between the defendants and the Government, it having been proven that the defendants' contracts were made with local

governmental units, rather than with the United States Government, though evidence shows that their pay came from the United States. Mr. Justice Black speaking for the Court, said:

“The government’s money would never have been placed in the joint fund for payment to respondents had its agents known the bids were collusive. By their conduct, the respondents thus caused the government to pay claims of the local sponsors in order that they might in turn pay respondents under contracts found to have been executed as the result of the fraudulent bidding. This fraud did not spend itself with the execution of the contract. Its taint entered into every swollen estimate which was the basic cause for payment of every dollar paid by the P. W. A. into the joint fund for the benefit of respondents. The initial fraudulent action and every step thereafter taken pressed ever to the ultimate goal—payment of government money to persons who had caused it to be defrauded.”

This Court also held that the same rule applied in criminal prosecutions under the false claim statute, 18 U. S. C. A., Sec. 80, the opinion using the following language in holding that the rule of criminal procedure should likewise apply to *qui tam* actions:

“* * * we cannot say that the same substantive language has one meaning if criminal prosecutions are brought by public officials and quite a different meaning where the same language is invoked by an informer.”

See also *United States v. Gonzales*, 56 Fed. Supp. 995. This was a prosecution under Title 18 U. S. C. A., Sec. 80 charging conspiracy to defraud the United

States by causing false claims against the government to be presented. The claims of the defendant are quite similar to those made by appellant in his brief. His argument is summarized by the Court as follows:

- “1. The defendant was employed by the Shipyard, a private corporation, and not by the Navy Department or by any branch or agency of the United States Government.
2. No money was paid by the United States Navy Department to the defendant or any of his fellow conspirators.
3. No claim for payment was ever made or presented, or caused to be made or presented, by the defendant or anyone in his behalf, for payment or approval, to any person or officer in the civil, military or naval service of the United States, or any department thereof; nor was any false or fraudulent statement or entry made or caused to be made in any matter within the jurisdiction of any department or agency of the United States.”

The Court in denying the motion to quash stated:

“The defendant and his fellow conspirators, according to the allegations of the indictment, conspired to set in motion the machinery which would eventually result in the presentation of false claims to the Navy Department.”

The *Gonzales case*, *supra*, is closely analogous in fact and relationship of parties to the instant case, but appellant's contention that there was a failure of proof to show knowledge on his part that he was defrauding an agency of the United States, is met

by very competent evidence touching this viewpoint, though no concession is here made by appellee, in discussing this phase of the case, that the government was burdened with the responsibility of proving knowledge on the part of the defendant that the Olympic Commissary was an agency of the United States. This question is fully disposed of by the reasoning and language of the *Johnson* and *Hall* cases, *supra*, and by the Statute, Title 18, Section 73.

Exhibits N., O., P. were photographs that are not before the writer of this brief, having been transmitted in original form to the Circuit Court of Appeals, and not included or reproduced in any manner in the transcript of record. The Assistant United States Attorney who tried the case before the District Judge offered a series of photographs in evidence. He was given no opportunity to identify them by the F. B. I. agent who was a witness on the stand at the time of the offer. The reason for this was the interruption by defendant's counsel who suggested that all of the photographs which Assistant United States Attorney Erickson had before him in Court and which he was about to identify by the witness, be offered in evidence at one time. This is clear from the colloquy as it appears in the record.

“Mr. Erickson: I hand you plaintiff's identification “H”, (58) and ask you to state what that is?

A. It is a photograph of a sign which appears on the Hanford Reservation, a picture of the sign.

Mr. Sandvig: If you will offer them all in evi-

dence, my objection will be the same to all of them. Offer that one.

Mr. Erickson, I offer "H" in evidence. What are your objections?

Mr. Sandvig: The witness says this one appears on the Hanford Reservation. That is what I am afraid of, Judge, that we will get this case where we are trying to make a case out of nothing. In other words, who put it there? Maybe I put it up there. Who had the authority to put it up?

The Court: Let me see the rest of the pictures.
(Pictures handed to the Court)

Mr. Sandvig: They are all in the same category.

Mr. Erickson: They purport to show the general character of the property there inside the mess halls.

Mr. Sandvig: If I put them up there and I did not have any authority, they should have arrested me. That is the danger in this case.

The Court: I will sustain the objection to "M", "L", "K", "J", and "H", and admit "N", "O", and "P", and allow an exception. (59)

(Testimony of C. E. Piper.)

(Photographs admitted in evidence as plaintiff's exhibits "N", "O", and "P".) (T. of R. 100-101)

It is clear that the only objection which defendant's counsel had to the exhibits related to the authority of whoever might have placed them in the mess hall and about the Hanford Project. No objection was heard then that the identification of the exhibits was incomplete because of the time of their display in the mess

hall. No opportunity was given Government counsel to further identify these exhibits by the learned trial judge, and certainly the language of defendant's counsel's objection conveyed no intimation to the learned trial judge or government counsel that lack of identification as to time of display in the mess hall was the ground of the objection. It comes with poor grace now for defendant's counsel to claim that the time of posting of the pictures represented by the exhibits which were received, may or may not coincide with the time the defendant was an employee of the Hanford Project. One of these pictures depicted a large sign visible to all workmen sitting in the mess hall frequented by the defendant Haugen—Mess Hall No. 7—"This is a Federal project. Those violating the law hereon will be subject to federal prosecution".

The very secrecy which prevaded the atmosphere surrounding the Hanford Atomic Bomb Project, of which the trial judge was fully aware, he having handled all of the condemnation cases involving the taking of land for this project, demonstrated it to be an important military undertaking under the control of the United States Army Engineers. See Judge Schwellenbach's remarks during the trial.

"* * * I put the title through myself that the real estate belongs to the Government, and (70) the buildings constructed thereon must necessarily belong to the Government." (T. of R. 111)

The presence of military personnel at the gates, the extreme caution with which every person entering

and going from the Project's gates was inspected and examined, the constant mystery as to what type of chemical or ammunition would be manufactured at the project, the vastness of the area of land involved—some 400,000 acres condemned by the United States of America and dislodging thousands of farmers in the area—the enormous army of men and women who were recruited for employment—some 47,000, the constant newspaper references to the Government's condemnation cases and to the vastness of the project itself, were all factors which any normal American present and seeing would, of necessity understand to be the external evidences of a gigantic governmental operation engaged in aiding the prosecution of the war. These matters, however, are secondary in character, and are not of essential importance in determining the question before us. As stated at the outset of the discussion of this assignment of error, the evidence was conclusive and without dispute that the Olympic Commissary Company was *an agency of the United States of America*; that the defendant knowingly and willfully procured counterfeit meal tickets for the purpose of defrauding the Olympic Commissary Company. This made the crime complete. To repeat the words of Judge Moscowitz in *United States v. Hall, supra*:

“The defendant will not be permitted to testify that he did not intend to defraud the United States when his admitted acts constituted such defrauding.”

CONCLUSION

Summarizing the foregoing, it is respectfully submitted that appellee has met the contentions of the appellant as follows:

I. The defendant was not in jeopardy as a result of the first hearing for the reason that the indictment in the first hearing was claimed to be invalid by the defendant's counsel and found to be invalid by the trial court. Jeopardy is premised upon a valid indictment or charge.

II. Secondary evidence of the contracts setting up the duPont Company and the Olympic Commissary Company as agencies of the United States of America was properly admissible for the reason that the President of the United States, under the authority vested in him in the War Powers Act, had ordered that the prime contract between the United States Army and the duPont Company be considered secret and the Department of War had ordered that the contract between the duPont company and th Olympic Commissary Company be considered restricted. This was war and the protection and very existence of the Nation was involved. Established peace time rules of evidence must give way to the emergencies of war in such times.

III. The matter of reopening the case following the filing of the Court's memorandum decision and before pronouncement of judgment was wholly within the discretion of the trial judge and this discretion was most certainly properly exercised in this case for the

reason that the Court had, to all outward appearances, approved the admissibility of the testimony of the witness, Major Ebbs, and the government's counsel had no means of knowing that the Court would, later, disapprove it, until the Court's opinion was filed. As the trial judge pointed out, he felt it his judicial duty to permit the government to supply that degree of secondary evidence which his opinion established as a requirement of the case. (T. of R. 178)

IV. The argument that the defendant did not know he was defrauding the United States when he defrauded the Olympic Commissary Company falls in view of the language of the statute, Sec. 73, Title 18, which makes it a crime to defraud an agency of the United States, the Olympic Commissary Company having been established, without dispute, to have been an agency of the United States in the transactions under inquiry.

For the foregoing reasons appellee respectfully submits that the judgment of the District Court should be affirmed in all particulars.

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No. 11063

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**United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT**

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Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

*Upon Appeal from the District Court for the Eastern
District of Washington, Northern Division*

Reply Brief

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ASSIGNMENT OF ERROR NO. 4

Former Jeopardy

Without waiving the other errors assigned, we devote this brief to replying only to that portion of Appellee's Brief which deals with the question of former jeopardy by reason of the opinion of the Court which found the evidence was insufficient and directed the dismissal of the case against the appellant. This portion of appellant's brief commences on page 13 and ends near the top of page 15. It is headed as follows:

“III. Discussion of Appellant's Third Assignment of Error, viz., That the Court's Memorandum Decision was a Final Judgment of Dismissal.”

This heading is misleading. Appellant's Assignment of Error therein discussed was not his third but his fourth assignment. The assignment was not limited to the contention that the Court's Memorandum Decision was a Final Judgment of Dismissal. It embraced and included a contention that the Court erred in overruling the objection to the introduction of further evidence, after his written opinion finding for the defendant on the insufficiency of the evidence, and that in doing so the Court placed the defendant in double jeopardy in violation of his constitutional rights.

The assignment of error which appellee's counsel

discusses under his own heading, wording it as above, is worded on pages 15 and 16 of Appellant's Brief as follows:

"ASSIGNMENT OF ERROR No. 4

"The District Court erred in overruling defendant's objection to the introduction of further testimony after the written opinion of the Court filed December 22, 1944, stating, 'The action must be dismissed,' as follows:"

This is followed by setting out that portion of the record wherein Mr. Sandvig, appellee's counsel at the trial, clearly raised the question of former jeopardy by reason of the trial which terminated in the Court's opinion finding that the action must be dismissed.

None of the cases cited in Appellee's Brief meet the contention which is here made. None of them deal with the constitutional right of the defendant not to be placed twice in jeopardy for the same offense. This may possibly explain counsel's attempt in the heading of his discussion to narrow this assignment to a mere technical contention, which ignores the broad constitutional question raised by the actual assignment made.

A mere reference to the authorities cited on pages 14 and 15 of Appellee's Brief is sufficient to show that they have no application to the situation presented here.

Title 18, Section 688, U. S. C. A., and the Rules of Criminal Procedure for District Courts cited as authority for "the matter of reopening a criminal case for reception of further evidence before the entry of judgment, either of dismissal or guilt," contained no reference to such reopening. The section merely deals with the power of the Supreme Court to prescribe rules of practice and procedure with respect to proceedings after verdict or finding of guilt; and the rules which follow this section do not in any way refer to the reopening of a case after a verdict or finding, or to the introduction of evidence after such verdict or finding. Even had they done so, the constitutionality of such rules would have been highly questionable had they undertook to authorize such a procedure after a verdict or finding of not guilty.

People v. Grana, 36 Pac. (2d) 375 (Calif.), was a case where the defendant was found guilty by the trial court at the conclusion of the evidence. It merely held that the opinion of the Court did not control his former judgment of conviction. There was no finding by the trial court that the evidence was so insufficient as to compel a dismissal, nor was there any reopening of the case for the introduction of further evidence after the conclusion of the trial. The sentence imposed on the defendant in that case, moreover, was reversed on other grounds.

City v. Norwich, 274 Fed. 374, was an admiralty case, in which the Court had filed an opinion and dismissed the case. His holding that he had a right to reopen the case for the introduction of further evidence involved no question of constitutional right.

Rogers v. Hill, 289 U. S. 582, merely holds that the Circuit Court did not direct a dismissal in its mandate which reversed an interlocutory order for an injunction.

McGhee v. Leitner, 41 Fed. Supp. 674, holds that where a final decree is entered, the appeal is from that and not from the Court's opinion.

Rothschild and Company v. Marchall, 44 F. (2d) 546, is merely to the effect that a decree when entered cannot be governed by an opinion.

First National Bank of Graham v. Weitzel, 239 Fed. 497, holds that an opinion cannot take the place of formal findings on an appeal from a final judgment.

Lahman v. Burnes National Bank, 20 F. (2d) 897, holds that a judgment for a party cannot be reversed where there were no findings of fact and none requested. The following statement taken from the opinion in that case, p. 898, is authority for the position taken by appellant in this case:

“A general finding in favor of the party is treated as a general verdict.”

Uhl v. Dalton, 151 F. (2d) 502, is a case in which an appeal was sought to be taken from an opinion of the Court in which the Court had declared that neither party was entitled to judgment and ended his opinion with the words, “It is so ordered,” as Judge Mathews properly commented, p. 503.

“Thus, instead of directing the entry of a judgment, the Court, in effect, directed that no judgment be entered.”

None of the cases cited by appellee’s counsel were criminal cases except the first, a California case, and that did not involve the constitutional question of double jeopardy.

Our contention is that the opinion of the Court was a general finding of not guilty by a reason of the insufficiency of the evidence presented to him in the course of a trial. His finding of not guilty was so strong that he concluded it with the words, “Therefore, the action must be dismissed.” His finding was the equivalent of a verdict of not guilty.

It is a general finding, of course, but the law does not contemplate that formal Findings of Fact and Conclusions of Law should be entered by the Court in the trial of a criminal case, nor does it contemplate or require a formal judgment to give efficacy to a

verdict of not guilty, or to a finding of not guilty. It may comport more with the dignity of a Court and with the proper keeping of its records that a formal order of discharge should be entered when a jury finds a defendant not guilty, or when a court finds him not guilty, but it cannot destroy the efficacy of a verdict of not guilty, or a finding of not guilty, if such an order be not entered. The verdict of not guilty by a jury protects the defendant from another trial for the same offense, regardless of whether or not the Court follows it with an order of discharge, or dismissal, or judgment.

Our Supreme Court passed squarely upon this point in the case of *Ball v. United States*, 163 U. S. 662, 41 Law Edition. In that case a verdict of not guilty was rendered on Sunday, and an order of discharge was entered on Sunday as to one of the defendants. It was held that the order was void as being entered on Sunday, but that the defendant could not again be tried. The Court on page 671 said:

“As to the defendant who had been acquitted by the verdict duly returned and received, the court could take no other action than to order his discharge. The verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the Constitution. However it may be in England, in this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same

offense. *United States v. Sanges*, 144 U. S. 310 (36; 446); *Com. v. Tuck*, 20 Pick. 356, 365; *West v. State*, 22 N. J. L. 212, 231; 1 *Lead. Crim. Cas.* 2d ed. 532.

“For these reasons, the verdict of acquittal was conclusive in favor of Millard F. Ball; and as to him the judgment must be reversed, and judgment rendered for him upon his plea of former acquittal.”

A reading of the trial court's oral opinion on this point in this case shows that he was under the misapprehension of believing that it was necessary even in jury cases for him to enter an order when the jury returned a verdict of not guilty, and that the only thing lacking so far as his finding of not guilty in his former opinion was concerned, was a formal order of dismissal.

In this connection the Court said:

“The jury returns a verdict of not guilty. That does not release the defendant. I have to sit here and say that the defendant is released and his bond discharged, or he is released from custody, and the Clerk makes an entry of that order.

“In some more formal cases it might be deemed advisable for me to sign an order, after the jury has returned a verdict. At least there must be some action on the Court's part, and so that here when I said it must be dismissed; it seems to me in the logic of the situation I would construe that order of dismissal on the facts as I outlined them at the time I wrote the opinion would have to be entered.” (Tr. 179)

It is obvious that the Court in this ruling had more

regard for the form than to the substance. It is obvious also that he was mistaken when he concluded that it was necessary for him to make an order of discharge or dismissal upon the verdict of a jury. In so far as the constitutional protection of defendant against double jeopardy is concerned, whatever may have been the desirability of clearing his records with respect to the release of the defendant and the exoneration of his bond bail, no such order was necessary. He was here concerned not with such lesser technical matters, but with a high constitutional right, with which the defendant is clothed when the verdict is rendered or finding made, which no order or lack of order or action on his could divest from the defendant.

In *People v. McGrath*, 96 N. E. 92, the defendant was found guilty of murder in the second degree on an indictment charging him with "guilty of murder in the first degree." His counsel, under pressure by the court, moved to set the verdict aside. Counsel then tried to withdraw this motion, but the court erroneously refused to allow him to do so and granted the motion and set the verdict aside. He was again brought to trial, and in sustaining his objection to being placed twice in jeopardy, the Court on pages 95-96 said:

"A plea of autrefois convict under the third

subdivision of this section would not have been strictly appropriate in the case at bar, as no judgment had been rendered on the first verdict. The guaranty against twofold jeopardy, however, being a constitutional right, any objection on the record which clearly raises that issue at the outset of the second trial is sufficient as a plea in bar. 'The doctrine that a man once tried and convicted, or acquitted of a crime on a valid indictment by a court of competent jurisdiction, cannot be tried again for the same offense, has its foundation in the principles of justice, and is a very ancient doctrine of the common law. It is embodied in that provision of the Constitution of our state (article 1, sec. 6) which declares that "no person shall be subject to be twice put in jeopardy for the same offense." In the application of this constitutional principle, it is well settled that an acquittal or conviction by verdict of a jury, although not followed by judgment or sentence, is an acquittal or conviction which protects an accused person against another trial, provided there was a competent court and a lawful indictment, or, in case of conviction, so long as the judgment remains unreversed.' *People v. Cignarale*, 110 N. Y. 23, 30, 17 N. E. 135, 142. At common law a judgment was not necessary to support a plea of *autrefois convict*. This appears from the statement of Sir William Blackstone to the effect that the plea of a former conviction for the same identical crime is a good plea in bar, though no judgment was given or perhaps ever will be, as when suspended by the benefit of clergy or some other cause. 4 Blackst. Com. 330."

It has universally been held that the finding or findings of the Court in a case tried without a jury is equivalent to and has the same effect as the verdict of a jury.

Motter v. Wallace, 72 Fed. Rep. (2d) 678, 680;

McPherson v. Cement Gun Co., 50 F. (2d) 889, 890.

It has also been held that such findings may be general or special, and where a general finding is made it too has the same effect as the verdict of a jury.

In *Globe Indemnity Co. v. Southern Pac. Co.*, 30 F. (2d) 580, the Court on page 583 said:

“It is suggested in the brief of defendant’s counsel that the District Court should have made special findings. This was unnecessary, and its general finding had the effect of a verdict of a jury. *Vicksburg, etc., Ry. Co. v. Anderson-Tully Co.*, 256 U. S. 408, 41 S. Ct. 524, 65 L. Ed. 1020; *Compania Transcontinental de Petroleo v. Mexican Gulf Oil Co.* (C. C. A.) 292 F. 846.”

In *O’Keefe v. Pearson*, 73 F. (2d) 673, the Court on page 676 said:

“The verdict or general finding of the District Court in favor of the plaintiff included findings of all facts essential to the verdict, including one to the effect that the defendant was the real owner of the stock, if there was evidence from which such finding could be made. *Allen v. Merrimack County Odd Fellows,’ Mut. Relief Association*, 72 N. H. 525, 527, 57 A. 922.”

Meyer v. Everett Pulp & Paper Co., 193 F. 857, 863;

United States v. Feather River Lumber Co., 23 F. (2d) 936, 939.

In criminal cases, no provision is made in the law for special findings of fact and conclusions of law, nor need they be separately stated. The simple issue is, "guilty" or "not guilty," and the determination is always a general finding based upon the sufficiency or insufficiency of the evidence presented. That determination may be expressed in simple words, "I find the defendant not guilty," or it may go further and give strong and cogent reasons for the finding. It may analyze the evidence and demonstrate its legal insufficiency to convict, as the Court did in this case, and it may conclude with the strong words: "Therefore, the action must be dismissed." But whatever its wording, if it be a determination by the court, after the submission of the case to him, that the defendant cannot be found guilty, then it is a finding of not guilty, and the defendant cannot be tried again for the same offense.

To reopen the defendant's case for the introduction of further evidence after such a finding has been made, is to try him again, with the added disadvantage that the court can consider not only the new evidence presented against him, but that which was introduced in the former trial.

The action of the Court in permitting the case to be reopened and further evidence to be introduced demonstrates that he was fully convinced that the

evidence offered at the first trial was insufficient to convict. Having reached that determination after the conclusion of the Government's evidence and after the formal submission of the case to him by both sides and having announced it in writing—in other words, having found the defendant not guilty—he cannot again subject him to the jeopardy of a conviction in another hearing.

The constitutional guarantee against double jeopardy applies equally to trials by Courts, as to trials by jury, and its application is governed by the same principles. It has been so held.

In *Rosser v. Commonwealth*, 167 S. E. 257 (Va.), a nolle prosequi was entered after a trial had commenced before a judge. Defendant was again indicted, and was convicted, his plea of former jeopardy having been stricken by the trial court. In reversing this ruling, the Supreme Court of Appeals of Virginia on page 259, said:

“It is a settled law, everywhere, that jeopardy means the danger of conviction. In so far as the accused is concerned, this danger exists and is just as real when he is being tried by the court without a jury as it is when he is being tried by a jury. We perceive no difference. Especially is this true in the case at bar, as the trial before the court had progressed to the extent that the commonwealth had introduced the testimony of some or all of its witnesses. A trial by a court without a jury affords the same protection to the

accused to plead it in bar upon a second trial for the same offense as is afforded by a trial by a jury. In a trial before a court without a jury, the danger of conviction or jeopardy of an accused begins when the trial has reached the stage where the commonwealth begins to introduce its testimony. That stage in such a trial is equivalent to the swearing of the jury when the accused is tried by jury.

“The Constitution empowering the court to try a criminal case without the intervention of a jury does not deprive the accused of any protection he would have had if tried by jury. He simply waives the jury trial; nothing else.

“It was certainly not intended that in a trial before a court without a jury, the commonwealth, after introducing its evidence and finding it had failed to make a case against the accused, would be permitted to nolle prosecute the indictment and be entitled to subject the accused to another trial for the same offense. If this could be done, the accused would be liable to conviction for the same offense, in successive trials, subject only to the whim of the attorney for the commonwealth. This would violate the letter and spirit of the Constitution.”

Here the prosecuting attorney did not nolle prosecute the case because of insufficient evidence. He went much further. He completed the trial; he rested his case: “Mr. Erickson: The Government will rest.” (Tr. 137) He submitted a brief (Tr. 138). He invited and received a finding by the Court, and that finding was that his evidence was insufficient to convict. He placed the defendant in jeopardy until that finding was made. He cannot again place him in

jeopardy under the guise of a motion to reopen to introduce further testimony. The constitutional guarantee against double jeopardy is a fundamental right and cannot be so lightly frittered away.

In *Cornero v. United States*, 48 F. (2d) 69, after a jury had been empaneled, the prosecuting attorney asked for a continuance until the next calendar because two of his important witnesses who were under bond to appear were not present. The Court denied this request, and after a short continuance discharged the jury, but not the defendant. In sustaining his plea of former jeopardy, this Court on page 71 said:

“The fact is that, when the district attorney impaneled the jury without first ascertaining whether or not his witnesses were present, he took a chance. While their absence might have justified a continuance of the case in view of the fact that they were under bond to appear at that time and place, the question presented here is entirely different from that involved in the exercise of the sound discretion of the trial court in granting a continuance in furtherance of justice. The situation presented is simply one where the district attorney entered upon the trial of the case without sufficient evidence to convict. This does not take the case out of the rule with reference to former jeopardy. There is no difference in principle between a discovery by the district attorney immediately after the jury was impaneled that his evidence was insufficient and a discovery after he had called some or all of his witnesses. It is uniformly held that, in the absence of sufficient evidence to convict, the dis-

trict attorney cannot by any act of his deprive the defendant of the benefit of the constitutional provision prohibiting a person from being twice put in jeopardy for the same offense."

If a district attorney cannot deprive the defendant of his constitutional right by announcing the insufficiency of the evidence before the conclusion of the trial, *a fortiori* he cannot do so after its conclusion, either by announcing it himself, or having the court announce it when the case has been submitted for his decision.

In *Clawans v. Rives*, 104 F. (2d) 240, where a defendant was charged with disorderly conduct, and a witness was examined for the prosecution before a magistrate, the prosecutor had a *nolle prosequi* entered, and sought to convict the defendant on a second information. The Court on page 242 said:

"Attacking the validity of her conviction in Case No. 2, the appellant relies upon the Fifth Amendment to the United States Constitution providing that no person shall be subject for the same offense to be twice put in jeopardy of life or limb. Under the facts stated the appellant was put in jeopardy in Case No. 1. Jeopardy attaches in a case without a jury when the accused has been subjected to a charge and the court has begun to hear evidence."

In *People v. Collins*, 265 N. Y. S. 475, a defendant was arrested and placed on trial before a magistrate for disorderly conduct. After witnesses had testified,

the magistrate stated that he had observed among the papers before him a notation that the defendant had prior convictions, and being fearful that it might influence his decision, he declared a mistrial. "The magistrate neither dismissed the case nor discharged the relator, but instead remanded her for the purpose of a retrial" (p. 477). Further, the Supreme Court on page 477 said:

"It is clear that the magistrate did not intend to discharge the prisoner, for, if he directed that the action be dismissed, it would have been necessary to discharge the relator. The court stated that it was his desire to have another magistrate hear the case, since what he observed 'might be of a prejudicial nature against the defendant.' To this counsel for relator refused to consent, and requested that the court continue with the trial."

With respect to the plea of former jeopardy, the Court said:

"When a defendant is charged with disorderly conduct under section 722, Penal Law, or sections 1458 and 1459 of the Consolidation Act, the magistrate before whom the trial proceeds has summary jurisdiction to render a judgment of acquittal or conviction. Having once commenced the trial of a defendant upon such a charge, and having sworn a witness, the trial could terminate only either by an acquittal or by a judgment of conviction."

See also:

People v. Goldfarb, 152 App. Div. 870, 874,
138 N. Y. S. 62, 65, affirmed 213 N. Y. 664,
107 N. E. 1083.

Ex parte Ulrich, 42 F. 587, is an opinion written in 1890 by Judge Philips of the District Court of Missouri. It is a very learned opinion and discusses at length the authorities dealing with the fundamental right of the citizen not to be placed twice in jeopardy for the same offense. In that case Judge Philips released on *habeas corpus* a defendant who had been convicted in the State Court against his plea of former jeopardy. At the first trial, a jury was impaneled, and the trial judge discharging the jury on the ground that he, the Judge, was not well enough to proceed with the trial. In that case Judge Philips held, and supported his holding by numerous quotations from the Supreme Court of the United States, to demonstrate that the protection against double jeopardy does not spring alone from constitutional provisions, but is a right so fundamental that it is regarded as guaranteed by the common law to such an extent that it can be enforced by a federal court under the provisions of the 14th amendment, the 5th amendment not being applicable to the states. On page 590 quoted from Mr. Justice Miller, in *Ex parte Lange*, 18 Wall. 163, he said :

“If there is anything settled in the jurisprudence of England and America, it is that no man

can be twice lawfully punished for the same offense. * * * The principle finds expression in more than one form in the maxims of the common law. * * * In the criminal law the same principle, more directly applicable, * * * is expressed in the Latin, '*nemo bis punitur pro eodem delicto*,' or, as Coke has it, '*nemo debet bis puniri pro uno delicto*.' * * * The common law not only prohibited a second punishment for the same offense, but it went further, and forbid a second trial for the same offense, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted."

Can a right so fundamental be taken away from the defendant by a mere technicality? Can it be said that the finding of the Court, after the conclusion of the evidence, would have protected the defendant if the Judge had signed an order of dismissal or if the clerk had himself made an entry in the Court's journal, but that he is deprived of all protection if such purely technical and ministerial acts were not done.

We have already seen, from authorities cited, that the finding of the Court is equivalent to the verdict of the jury and that in jury cases, no order or judgment of the Court is necessary after the verdict to entitle the defendant to interpose his plea of former jeopardy. We have also seen that his consent to be tried by a judge instead of a jury waives none of his fundamental rights. When he is tried by the judge

and the judge finds that he is not guilty, he cannot again be tried without violating his constitutional rights.

The finding of the court of "not guilty" by reason of the insufficiency of the Government's evidence is contained in the concluding paragraph of his opinion:

"Since the plaintiff has failed to present the best evidence available to it, I am forced to conclude that I should have sustained the objection to the introduction of such testimony. That being true, it is my duty now to disregard it. Without such evidence, plaintiff has failed to sustain its burden that the Olympic Commissary was an agency of the United States and that the counterfeiting of its meal tickets was calculated to defraud the United States." (Tr. 18)

"Therefore, the action must be dismissed" is an inevitable conclusion from the finding which the Court made in the concluding paragraph of his opinion.

It is the finding which constitutes his verdict, and no further ministerial act on his part or the part of his clerk is necessary to give efficacy and force to the plea of the defendant, that he should not ever again be placed in jeopardy.

No justification for such violation, even if justification would suffice, is presented in the record before the Court. The only ground presented by the dis-

trict attorney in his motion to reopen the trial is that he thought he had sufficient evidence. He "took his chance" and presented insufficient evidence. He admitted in his motion that the evidence which he presented on the second hearing was readily available, as is shown by the following excerpt from his motion:

"Plaintiff further respectfully shows to the Court that the matter of securing a member of the Judge Advocate General's Department of the United States Army Engineers, who is familiar with the original prime contract referred to herein and in the Court's Memorandum Decision, and bringing such officer to Yakima as a witness is a comparatively simple matter; that the ends of justice would best be served, as the present lack of 'best evidence' as pointed out in the Court's Memorandum Decision, may be supplied in the manner requested herein." (Tr. 19)

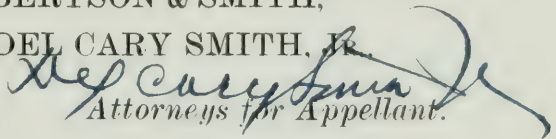
If the procedure followed in this case should be sanctioned by the blessing of this Court, no defendant in the future who is desirous of protecting his constitutional rights or to a fair and orderly trial could safely waive a trial by jury. He would subject himself to a trial at which the district attorney could present part of his testimony, or all of it, and then ask for a continuance in which to supply the missing links. He could place the defendant on trial, present all of his testimony and after the Court had found it insufficient, ask for another trial to present other and further testimony. If he could do this once, he

could do it twice and so on, *ad infinitum*. He could try the defendant piecemeal and by a system of trial and error, regardless of constitutional provisions. Such a procedure is shocking to all sense of justice and fairness. There must be an end to litigation, and litigation in a criminal case ought to end when a verdict of "not guilty" is rendered or when a finding of "not guilty" is made.

Respectfully submitted,

ROBERTSON & SMITH,

By DEL CARY SMITH, Jr.


Attorneys for Appellant.

No. 11064

United States
Circuit Court of Appeals
For the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

MADELEINE N. SHARP,
Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the Tax Court
of the United States

FILED

JUL 14 1961

PAUL P. O'BRIEN.

CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES:

For Taxpayer:

RAYMOND M. WANSLEY

For Comm'r:

RALPH E. SMITH, ESQ.

Docket No. 110477

MADELEINE N. SHARP,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1942

Apr. 9—Petition received and filed. Taxpayer notified. Fee paid.

Apr. 10—Copy of petition served on General Counsel.

May 11—Answer filed by General Counsel.

May 11—Request for hearing, in Los Angeles, Calif., led by General Counsel.

May 19—Notice issued placing proceeding on Los Angeles calendar. Service of answer and request made.

1943

Aug. 10—Hearing set Sept. 20, 1943—Los Angeles, Calif.

1943

Sept. 23—Hearing had before Judge Arnold on the merits. Submitted. Stipulation of facts filed. Briefs due Nov. 8, 1943, Reply Briefs Nov. 29, 1943.

Oct. 23—Brief filed by General Counsel. Served 11/6/43.

Nov. 5—Brief filed by taxpayer. 11/6/43 copy served on General Counsel.

Nov. 27—Reply brief filed by taxpayer. 11/27/43 copy served.

1944

June 27—Amended stipulation of facts filed by taxpayer.

July 7—Opinion rendered, Arnold J., Div. 12.
Decision will be entered under Rule 50.
Copies served.

Aug. 4—Computation as to deficiency filed by General Counsel.

Aug. 8—Hearing set 8/30/44 on settlement.

Aug. 21—Consent to settlement filed by taxpayer.

Aug. 22—Decision entered, Arnold, J., Div. 12.

Nov. 9—Stipulation of venue filed (Ninth Circuit).

Nov. 9—Petition for review by U. S. Circuit Court of Appeals, Ninth Circuit, with assignments of error filed by General Counsel.

Nov. 24—Proof of service filed by General Counsel. (Walter Ames).

Nov. 24—Proof of service filed by General Counsel (Raymond M. Wansley, C. P. A.).

1944

Nov. 24—Proof of service filed by General Counsel
(Madeline N. Sharp).

Dec. 13—Certified copy of order from Ninth Cir-
cuit extending the time to 3/19/45 to pre-
pare and deliver the record filed.

1945

Feb. 28—Certified copy of order from Ninth Cir-
cuit extending the time to 6/19/45 to pre-
pare and deliver the record filed.

May 21—Statement of points filed by General
Counsel with proof of service thereon.

May 21—Designation of portions of record filed
by General Counsel with proof of service
thereon. [1*]

United States Board of Tax Appeals
Washington, D. C.

Docket No. 110477

MADELEINE N. SHARP,

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

PETITION

The above named petitioner hereby petitions for
a redetermination of the deficiency set forth by the

*Page numbering appearing at top of page of original certified
Transcript of Record.

Commissioner of Internal Revenue in his Notice of Deficiency, Symbols LA:ET:GT:SMS, dated January 12, 1942, and as a basis for this proceeding alleges as follows:

1. The petitioner is an individual with her principal office at 1425 Bank of America Building, San Diego, California. The return for the period here involved was filed with the Collector for the Sixth District of California.

2. The Notice of Deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on January 12, 1942. [2]

3. The taxes in controversy are Gift Taxes for the calendar year 1938 and in the amount of \$750.00.

4. The determination of tax set forth in the said Notice of Deficiency is based upon the following errors:

(a) The Commissioner erred in disallowing to the petitioner an exclusion of \$5,000.00 allowable under Section 504 of the Revenue Act of 1932 with regard to a gift in trust of a value of \$252,090.79 made by the petitioner in the year 1938 and returned by her upon her gift tax return for said year.

5. The facts upon which the petitioner relies as a basis for this proceeding are as follows:

(a) The said gift in trust was a gift of a present interest, and the beneficiary, under the terms of the trust instrument, received the immediate unrestricted right to the use of, and the possession and enjoyment of, the income of the trust property.

Wherefore, the petitioner prays that this Board

may hear the proceeding and redetermine the petitioner's gift tax liability for the calendar year 1938.

(Signed) RAYMOND M. WANSLEY,
Certified Public Accountant,
Counsel for Petitioner. [3]

State of California

County of San Diego—ss.

Madeleine N. Sharp being duly sworn, says that she is the petitioner above named; that she has read the foregoing petition, or had the same read to her, and is familiar with the statements contained therein, and that the statements contained therein are true, except those sated to be upon information and belief, and those she believes to be true.

(Signed) MADELEINE NICHOLS
SHARP

Subscribed and sworn to before me this 6 day of April 1942.

[Notary Seal]

(Signed) GORDON GRAY

Notary Public in and for the State and County aforesaid. [4]

EXHIBIT A

Treasury Department
Internal Revenue Service
Los Angeles, California

January 12, 1942

Office of
Internal Revenue Agent in Charge
Los Angeles Division

Madeleine Nichols Sharp,
1425 Bank of America Building,
San Diego, California.

Madam:

You are advised that the determination of your gift tax liability for the calendar year 1938 discloses a deficiency of \$750.00 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of the Estate Tax Division. The signing and filing of this form will expedite the closing of your return by per-

mitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,

Commissioner

(Signed) By GEORGE D. MARTIN

Internal Revenue Agent in
Charge

Enclosures:

Statement.

Form of waiver. [5]

Donor: Madeleine Nichols Sharp

Calendar year 1938

STATEMENT

Gift tax year	Liability	Assessed	Deficiency
1938	\$21,763.62	\$21,013.62	\$750.00

In making this determination of your gift tax liability, careful consideration has been given to your protest dated November 15, 1941, and to your brief dated January 3, 1942.

A copy of this letter and statement has been mailed to your representative, Raymond M. Wansley, Bank of America Building, San Diego, California, in accordance with the authority contained in the power of attorney executed by you.

ADJUSTMENTS TO NET GIFTS

Schedule A of return—	Returned	Determined
Total gifts	\$250,000.00	\$252,090.79
Less: total exclusions	5,000.00	0.00
<hr/>		
Total included amount of gifts.....	245,000.00	252,090.79
Specific exemption	40,000.00	40,000.00
<hr/>		
Net gifts	205,000.00	212,090.79

EXPLANATION OF ADJUSTMENTS

Schedule A of return—	Returned	Determined
Accrued interest on bonds transferred	\$ 0.00	\$ 2,090.79
Exclusions	5,000.00	0.00

The accrued interest on the bonds transferred is included as it is considered to have been a part of the gift.

Under the terms of the trust instrument to which the gifts set forth on the donor's gift tax return are subject, none of the beneficiaries received the immediate unrestricted right to the use of, or the possession and enjoyment of, the income and/or corpus of the trust property and therefore no exclusions are allowable under Section 504 of the Revenue Act of 1932. [6]

COMPUTATION OF TAX

	Returned	Determined
Net gifts for 1938.....	\$205,000.00	\$212,090.79
Tax on total net gifts	20,700.00	21,763.62
Total tax payable for 1938.....	20,700.00	21,763.62
Amount assessed as deficiency pursuant to waiver	313.62	
Total tax assessed	21,013.62	21,013.62
Deficiency		750.00

[Endorsed]: U.S.B.T.A. Filed Apr. 9, 1942. [7]

[Title of Board and Cause.]

ANSWER

Comes Now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition of the above-named taxpayer, admits and denies as follows:

1, 2 and 3. Admits the allegations contained in paragraphs 1, 2 and 3 of the petition.

4 (a). Denies the allegations of error contained in subdivision (a) of paragraph 4 of the petition.

5 (a). Denies the allegations contained in subdivision (a) of paragraph 5 of the petition.

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

(Signed) J. P. WENCHEL ACB

Chief Counsel,

Bureau of Internal Revenue.

Of Counsel:

ALVA C. BAIRD,

Division Counsel.

FRANK T. HORNER,

B. M. COON,

Special Attorneys,

Bureau of Internal Revenue.

[Endorsed]: U.S.B.T.A. Filed May 11, 1942. [8]

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated by and between Madeleine N. Sharp and the Commissioner of Internal Revenue, by their respective attorneys, that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not at variance with the facts herein stipulated:

1. That on the 20th day of September, 1938, Madeleine N. Sharp executed an agreement between herself as donor and/or trustor and the Title Guaranty and Trust Company of the City of New York, State of New York, as trustee, for the benefit of Donald Nichols Sharp, son of Madeleine N. Sharp,

a true and correct copy of which agreement is attached hereto as Exhibit A.

2. That on the same date said Madeleine N. Sharp transferred to the Title Guaranty and Trust Company, as trustee, under said agreement, cash and securities having a fair market value of \$252,090.79. [9]

3. That Donald Nichols Sharp was born on September 9, 1922 and was sixteen years of age on September 20, 1938, the date as of which said agreement was executed.

4. That the present value of the right to receive the income from the said trust estate established by said agreement of September 20, 1938 was in excess of 5,000.00 as at September 20, 1938.

5. That the Commissioner of Internal Revenue in his letter of final determination addressed to Madeleine N. Sharp, has sought to tax the total value of said gift in trust and has refused to allow an exclusion of 5,000.00 with regard to said gift upon the grounds that the beneficiary did not receive the immediate right to the unrestricted use, possession or enjoyment of the income or principal of the trust estate and that the gift is considered to be a gift of a future interest against which no exclusion is allowable.

RAYMOND M. WANSLEY

Counsel for Petitioner

(Signed) J. P. WENCHEL

BHN

Chief Counsel

Bureau of Internal Revenue

Counsel for Respondent [10]

EXHIBIT A

This Agreement, made, executed and delivered this 20th day of September, 1938, by Madeleine Nichols Sharp, (hereinafter called the "Donor") and Title Guarantee and Trust Company (hereinafter called the "Trustee") a corporation organized and existing under the laws of the State of New York, having its principal place of business at No. 176 Broadway, New York City, New York,

Witnesseth:

Whereas, the Donor desires to establish a trust for the purposes, and upon the terms and conditions hereinafter provided;

Now, Therefore, in consideration of the premises and of the sum of One Dollar (\$1.00) to the Donor paid by the Trustee, the Donor hereby assigns, transfers and conveys unto the Trustee, its successors and assigns, the property and securities described in Schedule "A" hereto annexed and made a part hereof, In Trust Nevertheless, for the following uses and purposes, and on the terms and conditions hereinafter set forth:

Article First: A. To hold, manage, invest and reinvest said trust estate, and to collect and receive the rents, interest, income and dividends (hereinafter referred to as income) therefrom and after paying the proper charges against the same, to apply and pay over to the use and for the benefit of my son Donald Nichols Sharp the net income therefrom during his minority, and upon his reaching his majority to pay the net income to my said

[11] son Donald Nichols Sharp during his life. The Trustee may make any payment of any income thus applicable to the use of my son Donald Nichols Sharp, during his minority, by paying the same to his mother, or guardian of his property, or other person or corporation designated by the Donor (without obligation to look to the proper application thereof by the person receiving it) or by expending it in such manner as the Trustee, in its discretion, believes will benefit my son. Any balance of income shall be accumulated until the arrival of my son Donald Nichols Sharp at majority, at which time the Trustee shall pay over the said accumulated income to my son Donald Nichols Sharp.

B. Upon the death of my son Donald Nichols Sharp, this trust shall terminate, and the Trustee shall transfer and pay over to and among the children and issue of deceased children of said Donald Nichols Sharp the principal of said trust fund, per stirpes and not per capita.

C. In the event that my son Donald Nichols Sharp shall die leaving no children or issue of deceased children him surviving, then the Trustee shall assign, transfer and pay over the principal of said trust fund to and among the children and issue of deceased children of my daughter, Madeleine Healy, per stirpes and not per capita.

D. In the event that my son Donald Nichols Sharp shall die leaving no children or issue of deceased children him surviving, and there are no surviving children or issue of deceased children

of my daughter Madeleine Healy, then in that event the Trustee shall assign, transfer and pay over the principal of said [12] trust fund to my daughter Madeleine Healy.

E. In the event that there are no children or issue of deceased children of my son Donald Nichols Sharp and of my daughter Madeleine Healy them surviving, and my daughter Madeleine Healy be dead, then the Trustee shall assign, transfer and pay over the principal of said trust fund to the donor and if she be dead to and among the children and the issue of deceased children of my brother, C. Walter Nichols, and the children and the issue of deceased children of my deceased brother William H. Nichols, per stirpes and not per capita.

F. In the event that there are no children or issue of deceased children of my daughter Madeleine Healy, my son Donald Nichols Sharp, my brother C. Walter Nichols and my deceased brother William H. Nichols then surviving, and my daughter Madeleine Healy be dead, and the donor be dead, the Trustee shall assign, transfer and pay over the principal of said trust fund to and among the persons then entitled under the laws of the State of New York to share in the donor's estate in intestacy.

Article Second: Any moneys or share of principal which shall in pursuance of the provisions hereof become payable to a person who at the time when payment is herein directed to be made is under the age of twenty-one (21) years, shall vest absolutely in such person and shall be his or her

property; but the Trustee is authorized and directed to hold said moneys or share until such minor arrives at the age of twenty-one (21) years, at which time the Trustee shall pay over to him or her said moneys or share. The Trustee shall during such minority administer the [13] same with all the powers, authority and discretion granted to it as Trustee and shall collect the income therefrom, and may pay or apply such part of said income or of the principal as the Trustee shall deem necessary for the support, maintenance and education of such minor without the intervention of a guardian. Any balance of income shall be accumulated until the arrival of such minor at majority, at which time the Trustee shall pay over the said accumulated income to such minor.

The Trustee may make payment of any income or principal thus applicable to the use of a minor by paying the same to the parent, guardian or other person having the care and control of such minor (without obligation to look to the proper application thereof by the person receiving it), or by expending it in such manner as the Trustee in its discretion believes will benefit such minor and may also pay to the minor such sums as the Trustee approves as an allowance.

Article Third: A. The Trustee shall have with respect to any and all property at any time held by it hereunder the following powers:

1. To retain any such property as an investment without regard to the proportion such property or property of a similar character, so held, may bear to the entire amount of the trust estate regardless

of whether such security is a legal investment for a Trustee under the laws of the State of New York.

2. To sell at either public or private sale, and to grant options to purchase, any such property either for cash or on credit or partly for cash and partly on credit; also to exchange [14] any such property;

3. To invest and reinvest in, and to acquire by exchange, such property of any character as the Trustee may deem wise, necessary or expedient, including but not being limited to, bonds, notes, debentures, mortgages, certificates of deposit, common and preferred stocks, currency, money or real or personal property, without being limited to the class of securities in which Trustees are authorized by law or any rule of court to invest trust funds;

4. To participate in any plan of reorganization, consolidation, merger or similar plan of any corporation the securities of which constitute part of the trust estate; to consent to or oppose such plan and any action thereunder, or any contract, lease, mortgage, purchase, sale or other action by such corporation; and to deposit any portion of the trust estate with any protective reorganization or similar committee, to delegate discretionary power thereto and share in payment of the expenses and compensation thereof, and to pay any assessments levied with respect to such portion;

5. To exercise all conversion, subscription, voting and other rights of whatsoever nature pertaining to the trust estate, and to grant proxies, discretionary or otherwise, with respect thereto;

6. If at any time any part of the trust estate shall consist of any bond and mortgage on real estate, to foreclose such mortgage and buy in such real estate on such foreclosure, or take a deed thereof in lieu of such foreclosure; [15]

7. To lease any real property for such term or terms, whether five years or more or less than five years, and whether or not any such term may extend beyond the period of any trust created hereunder, without application to any court and with such options to the lessee of renewal or purchase and such covenants with respect to any improvements erected or which may be erected upon said property and upon such other terms and conditions as the Trustee may deem proper;

8. To mortgage any real property for the purpose of securing the purchase price thereof or of taking up any mortgage to which said property may at any time be subject, or of repairing or improving such real property or any part thereof or of paying any assessments or other charges thereon, or for any other purpose connected with the management of said property or with the administration of the trust estate, and to make, issue and deliver good and sufficient bonds and mortgages upon any of said property to secure the same upon such terms and conditions as the Trustee may deem proper;

9. To pay off and liquidate any mortgage or mortgages to which such real property may at any time be subject and to use any other property real or personal constituting part of the trust estate for that purpose;

10. To compromise, adjust and settle or to release upon such terms as the Trustee may deem proper, any claim which the Trustee may at any time have against any person, firm, or corporation growing out of or relating to any contract made in reference to, or injuries done upon, any real property held [16] hereunder, and if any person, firm or corporation shall at any time assert any claim against the Trustee or against any part of the trust estate, to compromise, adjust and settle any such claim upon such terms as the Trustee may deem proper;

11. Generally, to exercise as in its absolute judgment shall seem advisable for the benefit of the trusts hereby created with respect to any and all property which may at any time be in its hands or under its control as Trustee hereunder, all rights, powers and privileges of every name and nature which might or could be exercised by one owning such property absolutely and in his own right.

Article Fourth: The Trustee is also authorized in its discretion:

1. To register and hold securities or other property in the name of its nominee or in its own name individually, without any words indicating its fiduciary capacity, but the Trustee shall be liable for any loss which may result from such securities or other property being registered or held in such manner instead of in the name of the Trustee;

2. To pay ordinary and necessary expenses of the trust including reasonable attorneys' fees; and to pay all taxes, assessments, water rates and other

expenses incidental to the administration of any real property held hereunder;

3. To make any division or distribution required hereunder either wholly or partly in kind, at such values as in its discretion it may deem equitable and its determination as to the value of any such securities or other property shall be binding [17] and conclusive on all persons interested therein;

4. To make repairs and improvements to any real property and to charge the cost of such repairs and improvements wholly or partly to the trust estate or to the income thereof;

5. To appoint agents to act on behalf of the Trustee and to delegate to such agents discretionary power and to compensate such agents from the income of the trust estate;

6. To effect insurance upon any real property held hereunder and to procure insurance against public liability or such other public risks arising from the ownership of real property as may be insurable to the Trustee individually and to charge the premiums thereon wholly or partly to the trust estate or to the income thereof.

Article Fifth: All ordinary or extraordinary cash dividends and dividends payable in shares or other securities or obligations of corporations other than the declaring corporation shall be deemed income. All dividends payable in shares or other securities or obligations of the declaring corporation shall be considered income to the extent that they would constitute income taxable to the Trustee within the meaning of the Sixteenth Amendment

to the Constitution of the United States if not distributed by the Trustee hereunder. All dividends payable in shares or other securities or obligations of the declaring corporation not thus considered income shall be deemed principal. The Trustee shall have full power and authority to determine whether dividends payable in shares or other securities or obligations of the declaring corporation shall be deemed income or [18] principal in accordance with the standards set forth above.

Income accrued on property at the time of actual delivery of such property to the Trustee, whether or not such income is then due and payable, including dividends declared but not paid, shall be income of the trust estate. Upon the termination of any estate hereunder, income accrued but not yet due and payable on property, and income accumulated and not distributed, subject to any charges or advances against it, shall belong to the next estate.

The Trustee shall make no deductions from nor additions to income by reason of the purchase or sale of securities at a premium or discount.

The Trustee shall pay to the income beneficiary the income from any assets which may at any time constitute a part of the trust estate and which may be subject to depletion, without creating any reserve to offset the depletion of the corpus.

Where the assets of a corporation are distributed in complete or partial liquidation, the amounts thus received shall be deemed principal. All distributions of corporate assets to the stockholders, whenever made, which are designated by the corporation as a

return of capital or division of corporate property, shall be deemed distributions in complete or partial liquidation. Otherwise, the Trustee shall have full power and authority to determine whether a distribution is or is not in complete or partial liquidation.

Article Sixth: The decision of the Trustee with respect to the exercise or non-exercise by it of any discretionary [19] power hereunder, or the time or manner of the exercise thereof, made in good faith, shall fully protect it, and shall be conclusive and binding upon all persons interested in the trust estate. All powers granted to the Trustee shall apply to all property at any time held hereunder and until the actual distribution thereof.

Article Seventh: The principal and income of this trust estate shall be held by the Trustee free and clear from the control, debts, liabilities and engagements of any beneficiary hereunder and the receipts of any beneficiary shall be the sole discharge and release of the Trustee.

Article Eighth: Any corporation in which Title Guaranty and Trust Company, or any successor to it, shall be merged or with which or in which it or any successor to it shall have been consolidated, or any corporation resulting from any merger or consolidation to which it or any successor to it shall have been a party, shall succeed Title Guarantee and Trust Company, or any successor to it, as Trustee hereunder without the execution and filing of any instrument or further act of any kind.

Article Ninth: The Trustee shall be entitled to receive as compensation for its services in the administration of the trust, commissions at the rate allowed to a sole testamentary trustee under the laws of the State of New York in effect at the time that such commissions become payable. The value of any property and the increment thereof, received, distributed or delivered, shall be considered as money in making computation of commissions. One-half of the commission on principal shall be [20] payable as and when principal is received by the Trustee and the remaining one-half shall be payable as and when any principal shall be paid out or otherwise distributed; such receiving commission to be computed at the market value of property at the time of its receipt by the Trustee and such commission for paying out to be computed at the market value of such property at the time of such payment or distribution, provided, however, that the Trustee shall not be entitled to any commission for receiving any insurance policies held in trust until the collection of the proceeds or avails thereof and shall then be entitled to commission for receiving the amount of such proceeds or avails. Commissions upon income shall be payable as and when any income is received and may be deducted by the Trustee at the time of receipt of such income, whether such income is received or distributed, and shall be computed at annual rests.

Article Tenth: The Donor reserves the right for herself or any other person to increase this trust by delivering property to the Trustee. The duties

and liabilities of the Trustee shall under no circumstances be substantially increased by virtue of the provisions of this Article Tenth except with its written consent.

The Donor reserves the right, from time to time by instrument in writing delivered to the Trustee and acknowledged in the same manner as a conveyance of real property entitled to record in New York unless acknowledgment be waived by the Trustee, to modify or alter any of the provisions of this agreement relating to the power, authority and responsibility of the Trustee [21] with respect to the administration of the trust estate; provided, however, that the Donor reserves no right to revoke this instrument, change the beneficiaries hereunder or alter the interests conferred by Article First hereof upon said beneficiaries.

Article Eleventh: Any Trustee hereunder shall have the right at any time to resign by giving written notice of its resignation to the Donor, if living; otherwise, to the beneficiary who may then be entitled to receive income. If any Trustee or substituted Trustee shall resign or otherwise become incapable of acting, a substituted Trustee may be appointed by an instrument in writing signed by the Donor, or after her death, by the beneficiary, who may then be entitled to receive income; provided, however, that any such substituted Trustee shall be a bank having trust powers or a trust company, having a capital and surplus of not less than \$10,000,000.00.

Any Trustee may be removed as such Trustee

and any other bank or trust company substituted as Trustee by delivering to and leaving with the Trustee so removed and the bank or trust company so substituted, instruments in writing setting forth that such Trustee is removed and naming such other bank or trust company substituted as Trustee hereunder; provided, however, that any such substituted Trustee shall be a bank having trust powers or a trust company having a capital and surplus of not less than \$10,000,000.00. The instruments effecting such removal and substitution shall be signed by the Donor, or, after her death, by the beneficiary who may then be entitled to receive income. Upon receipt of such instrument removing the Trustee the Trustee so [22] removed, insofar as it is able, shall do any and all acts and things and execute and deliver any and all such instruments as may be necessary or proper to render such removal effective according to its true intent and purpose. Any substituted Trustee shall have and may exercise all of the powers hereby conferred upon Title Guarantee and Trust Company, including discretionary powers.

Article Twelfth: This trust shall not take effect until the execution of this agreement by both the Donor and the Trustee, and it shall be governed and construed in all respects according to the laws of the State of New York.

In Witness Whereof, Madeleine Nichols Sharp has hereunto set her hand and seal and Title Guarantee And Trust Company has caused this instrument to be executed by its Trust Officer and its cor-

porate seal to be hereunto affixed, duly attested by its Assistant Trust Officer, all in duplicate as of the day and year first above written.

(Signed) MADELEINE NICHOLS

SHARP (L.S.)

[Seal] TITLE GUARANTEE AND
TRUST COMPANY

By (Signed) C. REGINALD OATES

Trust Officer

Attest:

(Signed) FRANK M. VOTAW

Assistant Trust Officer [23]

State of New York

County of New York—ss.:

On the 20th day of September, 1938, before me came Madeleine Nichols Sharp, to me known to be the individual described in and who executed the foregoing instrument, and acknowledged to me that she executed the same.

[Seal] (Signed) YOLANDA TUVO

Notary Public, Queens County. Queens Co. Clk's

No. 2621, Reg. No. 6481. N. Y. Co. Clk's No.

283, Reg. No. 9T200. Bronx Co. Clk's No. 10,

Reg. No. 47T-39. Kings Co. Clk's No. 29, Reg.

No. 9126. Commission Expires March 30, 1939.

State of New York

County of New York—ss.:

On the 20th day of September, 1938, before me came C. Reginald Oates to me known, who, being by me duly sworn, did depose and say that he resides at Westport, Conn. that he is a Trust Offi-

cer of Title Guarantee and Trust Company, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Trustees of said corporation; and that he signed his name thereto by like order.

[Seal] (Signed) YOLANDA TUVO

Notary Public, Queens County. Queens Co. Clk's No. 2621, Reg. No. 6481. N. Y. Co. Clk's No. 283, Reg. No. 9T200. Bronx Co. Clk's No. 10, Reg. No. 47T-39. Kings Co Clk's No. 29, Reg. No. 9126. Commission Expires March 30, 1939 [24]

SCHEDULE "A"

Amount	Securities	Market value 9/20/38	Total value 9/20/38
\$ 7,000	City of New York reg. 4 $\frac{1}{4}$ s, 9/1/1960	111 $\frac{3}{4}$	\$ 7,822.50
10,000	City of New York 4 $\frac{1}{4}$ s, 9/1/1960.....	111 $\frac{3}{4}$	11,175.00
15,000	Gov't of Philippine Islands 5s, 2/1/1952	105 $\frac{1}{4}$	15,787.50
5,000	Central Pacific Rwy. Co. 1st ref. 4s, 8/1/1949	63	3,150.00
5,000	Canadian Nat'l Rwy. 3s, 2/15/1953	97 $\frac{1}{8}$	4,856.25
15,000	State of North Carolina Hwy. serial 4 $\frac{1}{2}$ s, 7/1/1951	117 $\frac{3}{4}$	17,662.50
2,000	City of New Orleans, La. new pub. imp. 4s, 1/1/42	103 $\frac{1}{2}$	2,070.00
10,000	Canadian Pacific Rwy. C. conv. 10 yr. 6s, 3/15/42	100 $\frac{1}{4}$	10,025.00
10,000	Canadian Nat'l Rwy Co. 20 yr. 4 $\frac{1}{2}$ s, 9/1/1951	112 $\frac{3}{8}$	11,237.50
1,000	City & County of San Francisco 4 $\frac{1}{2}$ s, 7/1/1960	118 $\frac{3}{8}$	1,183.75
4,000	City of Omaha, Neb. Sewer 5 $\frac{1}{2}$ s, 5/1/1941	110 $\frac{1}{2}$	4,420.00

Amount	Securities	Market value 9/20/38	Total value 9/20/38
\$ 1,000	City of New Orleans, La. 4½s, 1/1/41	105¾	1,053.75
15,000	State of Alabama Series C 4½s, 12/1/1938	100¾	15,112.50
12,000	City of Detroit ref. "A" Art Museum 4½s, 6/1/1947	101½	12,135.00
1,000	City of Fort Worth, Texas, 4½s, 1/1/1940	103¼	1,032.50
25,000	City of Los Angeles, Cal. 4½s, 10/1/1940	104⅞	26,218.75
16,000	City of New York 4¼s, 3/1/1964	113	18,080.00
25,000	Port of New York Authority 4s, 3/1/1975	107¼	26,812.50
30,000	Triborough Bridge Authority 4s, 4/1/1977	108⅝	32,587.50
2,400	Phelps Dodge Corporation conv. 3½s, 6/15/1952	111½	2,676.00
3,000	U. S. Treasury 1⅜% notes 6/15/1941	102-5/32	3,064.69
200	shs. United Gas Improvement Co. \$5 pfd.	107⅝	21,525.00
	Cash		311.81
			<hr/> \$250,000.00

[Endorsed]: T.C.U.S. Filed Sept. 23, 1943. [26]

[Title of Tax Court and Cause.]

AMENDED STIPULATION OF FACTS

Whereas the stipulation of facts, in the above entitled matter, filed by counsel for Petitioner and Counsel for Respondent with the Tax Court of the United States under date of September 23, 1943, contains a discrepancy as to the name of the Trus-

tee of that certain trust created by the Petitioner herein on September 20, 1938, a copy of the trust instrument being attached as Exhibit A to the said stipulation of facts;

Now Therefore it is hereby stipulated by and between Madeleine N. Sharp and the Commissioner of Internal Revenue by their respective attorneys as follows:

1. The correct name of the Trustee of the said Trust created by Petitioner under date of September 20, 1938 was and is "Title Guarantee and Trust Company".

2. Said "Title Guarantee and Trust Company" was and is a corporation organized and existing under the laws of the State of New York and having its principal place of business at Number 176 Broadway, New York City, New York.

RAYMOND W. WANSLEY

Counsel for Petitioner

(Signed)

J. P. WENCHEL, ECC.,

Chief Counsel, Bureau of Internal Revenue

Counsel for Respondent

[Endorsed]: T.C.U.S. Filed Jun. 27, 1944.

[27]

[Title of Tax Court and Cause.]

Petitioner created a trust giving the income therefrom to her son for life. The trustee was to apply and pay over the trust income to the use

and for the benefit of the son, with discretionary powers during his minority as to whom payment thereof would be made. Upon the son's death, the trust terminated, the corpus to be distributed as directed by the trust indenture except to any minor beneficiaries during their minority, as to whom broad discretionary powers were vested in the trustee. The value of the son's right to receive the trust income at the time of the gift was in excess of \$5,000. Held, petitioner is entitled to a \$5,000 exclusion in determining her gift tax liability as the gift of income was a present and not a future interest.

Raymond M. Wansley, C.P.A., for the petitioner.

Ralph E. Smith, Esq., for the respondent. [28]

OPINION

Arnold, Judge: This proceeding involves a gift tax deficiency of \$750 for 1938. The issue is whether petitioner is entitled to a \$5,000 exclusion under section 504, Revenue Act of 1932. We adopt as our findings of fact the facts admitted in the pleadings and stipulated by the parties.

Petitioner's return for the period here involved was filed with the collector for the sixth district of California.

On September 20, 1938, petitioner executed an agreement between herself as donor and/or trustor and the Title Guarantee and Trust Company of the City of New York, as trustee, for the benefit of Donald Nichols Sharp, her son. On the same date she transferred to the Title Guarantee and Trustee

Company, as trustee, under the agreement, cash and securities having a fair market value of \$252,-090.79.

Donald Nichols Sharp was born on September 9, 1922.

The present value of the right to receive income from the trust estate established by the agreement of September 20, 1938, was in excess of \$5,000 at that date.

The relevant provisions of the trust indenture are as follows:

* * * * *

Article First: A. To hold, manage, invest and reinvest said trust estate, and to collect and receive the rents, interest, income and dividends (hereinafter referred to as income) therefrom and after paying the proper charges against the same, to apply and pay over to the use and for the benefit of my son Donald Nichols Sharp the net income therefrom during his minority, and upon his reaching his majority to pay the net income to my said son Donald Nichols Sharp during his life. The Trustee may make any payment [29] of any income thus applicable to the use of my son Donald Nichols Sharp, during his minority, by paying the same to his mother, or guardian of his property, or other person or corporation designated by the Donor (without obligation to look to the proper application thereof by the person receiving it) or by expending it in such manner as the Trustee, in its discretion, believes will benefit my son. Any balance of income shall be accumulated until the arrival

of my son Donald Nichols Sharp at majority, at which time the Trustee shall pay over the said accumulated income to my son Donald Nichols Sharp.

* * * * *

Paragraphs B, C, D, E, and F. of Article First provide that the trust shall terminate upon the death of the son and the principal of the trust shall be paid over to and among the children and issue of deceased children of Donald Nichols Sharp. If the latter died without children or issue of deceased children him surviving, the principal was distributable among the children and issue of deceased children of the donor's daughter; if the daughter had none such the principal went to her; if the daughter failed to survive, the donor became the distributee; if the donor likewise failed to survive the principal went to the children and issue of deceased children of the donor's brother; and if all the above persons failed to survive the donor's son, the principal was distributable among the persons then entitled under the laws of the State of New York to share in the donor's estate in intestacy.

Article Second of the trust indenture reads as follows:

Article Second: Any moneys or share of principal which shall in pursuance of the provisions hereof become payable to a person who at the time when payment is herein directed to be made is under the age of twenty-one (21) years, shall vest absolutely in such person and shall be his or her property; but the Trustee is authorized and directed to hold said moneys or share until such minor arrives

at the age of twenty-one (21) years, at which time the Trustee shall pay over to him or her said moneys or share. The Trustee shall during such minority administer the same with all the powers, [30] authority and discretion granted to it as Trustee and shall collect the income therefrom, and may pay or apply such part of said income or of the principal as the Trustee shall deem necessary for the support, maintenance and education of such minor without the intervention of a guardian. Any balance of income shall be accumulated until the arrival of such minor at majority, at which time the Trustee shall pay over the said accumulated income to such minor.

The Trustee may make payment of any income or principal thus applicable to the use of a minor by paying the same to the parent, guardian or other person having the care and control of such minor (without obligation to look to the proper application thereof by the person receiving it), or by expending it in such manner as the Trustee in its discretion believes will benefit such minor and may also pay to the minor directly such sums as the Trustee approves as an allowance.

Article Third enumerates the broad powers vested in the trustee with respect to any and all property at any time held by it under the trust indenture including in paragraph 11 thereof the power, generally, to exercise as in its absolute judgment shall seem advisable for the benefit of the trusts "all rights, powers and privileges of every name and nature which might or could be evercised by

one owning such property absolutely and in his own right." Article Fourth authorizes the trustee in its discretion to register and hold securities or other property in its own name or in the name of a nominee, to pay the ordinary and necessary expenses of the trusts, to make any divisions or distributions wholly or partly in kind, to make repairs and improvements and charge the cost to income or corpus, to appoint agents, and to insure the real property and charge the premiums to income or corpus. [31]

Article Fifth relates to dividends of all kinds and classifies such dividends as income or principal, to premiums and discounts on purchases or sales by the trustee, to income accrued on property delivered to the trustee, to the income from depletable assets which the trustee was required to distribute to the income beneficiary without creating a reserve to offset the depletion of the corpus, and to distributions by corporations of its assets in complete or partial liquidation. Article Fifth also provides:

* * * * *

Upon the termination of any estate hereunder, income accrued but not yet due and payable on the property, and income accumulated and not distributed, subject to any charges or advances against it, shall belong to the next estate.

Article Sixth of the trust indenture reads as follows:

Article Sixth: The decision of the Trustee with

respect to the exercise or non-exercise by it of any discretionary power hereunder, or the time or manner of the exercise thereof, made in good faith, shall fully protect it, and shall be conclusive and binding upon all persons interested in the trust estate. All powers granted to the Trustee shall apply to all property at any time held hereunder and until the actual distribution thereof.

The remaining articles of the trust indenture provided that the trustee shall hold trust corpus and income free and clear from the control, debts, liabilities and engagements of any beneficiary, for succession in interest of any corporation merged or consolidated with the Title Guarantee and Trust Company; that the trustee should receive commissions at the rate allowed to a sole testamentary trustee under the laws of New York; that the donor should have the right to increase the trust corpus and the right to modify or alter the provisions of the trust agreement relating to the [32] power, authority and responsibility of the trustee in administering the trust but no right to revoke the trust, change the beneficiaries or alter their interests; and that successor trustees should be appointed upon the resignation of the trustee or the removal thereof by an instrument in writing executed by the donor, or after her death the income beneficiaries, the substituted trustee to be a bank having trust powers or a trust company having a capital and surplus of not less than \$10,000,000.

Respondent refused to allow petitioner a \$5,000 exclusion with regard to the gift upon the grounds

that the beneficiary did not receive the immediate right to the unrestricted use, possession or enjoyment of the income or principal of the trust estate and that the gift was a gift of a future interest against which no exclusion is allowable.

Section 504 of the Revenue Act of 1932, set forth in the margin,¹ deals with net gifts, and subsection (b) thereof excludes from "net gifts" the first \$5,000 of gifts (other than of future interest in property) made to any person by the donor during the calendar year. Article 11 of Treasury Regulations 79 (1933 Ed.) declares that "A future interest in property is any interest or estate in property, [33] whether vested or contingent, which is limited to commence in use, possession or enjoyment at some future date or time." The Supreme Court approved this regulation in *Helvering v. Hutchings*, 312 U. S. 393, 25 AFTR 1188; *United States v. Pelzer*, 312 U. S. 399, 25 AFTR 1194; and *Ryerson v. United States*, 312 U. S. 405, 25 AFTR 1191.

Respondent contends that since the trustee had sole discretion with respect to how much trust income shall be distributed to petitioner's son during

¹Sec. 504. Net Gifts.

(a) General Definition.—The term "net gifts" means the total amount of gifts made during the calendar year, less the deductions provided in section 505.

(b) Gifts Less Than \$5,000.—In the case of gifts (other than of future interests in property) made to any person by the donor during the calendar year, the first \$5,000 of such gifts to such person shall not, for the purposes of subsection (a), be included in the total amount of gifts made during such year.

his minority, the gift constituted a gift of a future interest and petitioner is entitled to no exclusion. He interprets Article First of the trust indenture to mean that the trustee may pay income for the use of the son during his minority to persons designated by the donor, that the trustee may make expenditures which in the discretion of the trustee will benefit the son, and that any balance shall be accumulated until the son reaches his majority.

We cannot agree with respondent's interpretation. In our opinion the trustee had no discretion with respect to paying over the trust income. After collecting the trust income and after paying the proper charges against the same the trustee was "to apply and pay over to the use and for the benefit of, *** Donald Nichols Sharp the net income therefrom during his minority, ***." The trustee acquired no discretionary powers by this language. The discretion lodged in the trustee was not whether it would "apply and pay over" or accumulate the net income, but whether it would make the required payment to the beneficiary's mother, or his guardian, or other person designated by the donor, or whether the trustee itself would expend the [34] income in such manner as would benefit the son. Such discretion gives no authority or power to the trustee to determine if it will or will not pay over as it deems proper and fit and would constitute no defense in a suit on behalf of Donald Nichols Sharp to recover the net income of the trust in the hands of the trustee. The provision for accumulating any balance of income must be construed in

the light of the other language used in Article First. In our opinion this provision was purely precautionary and constituted no limitation upon the trustee to apply and pay over the net income to the son.

The provisions of Article Second, when read with the other articles of the trust, show that the powers therein granted were effective only upon termination of the trust by the death of the life beneficiary. Any discretionary powers granted the trustee over succeeding estates would be immaterial in determining whether Donald Nichols Sharp was entitled under this indenture to the present use, possession and enjoyment of the trust income. The above quoted portions of Articles Fifth and Sixth, upon which respondent relies, constitute no limitation upon the son's right to the present use, possession and enjoyment of trust income. The one by its very terms relates only to the termination of estates; the other has to do with the good faith exercise of the trustee's discretionary powers, and, as heretofore pointed out, the trustee had no discretion in applying and paying over the trust income to Donald Nichols Sharp but only a discretion as to whom the required payment of income would be made for the use and benefit of the donor's minor son. [35]

The rule which respondent invokes and contends we should follow, namely, that where income to be distributed to beneficiaries of a trust is subject to the uncontrolled judgment and discretion of the trustees, such gifts of income are gifts of future interests, against which no exclusions are allowable, is amply supported by authorities. Mary M. Hutch-

ings, 1 T. C. 692, affirmed (CCA 5), 141 Fed. (2d) 422 (March 1944); Estate of W. W. Fondren, 1 T. C. 1036, affirmed (CCA 5,) 141 Fed. (2d) 419, (March 1944), certiorari applied for; Welch v. Paine (CCA 1), 130 Fed. (2d) 990, 30 AFTR 33; Commissioner v. Taylor (CCA 3), 122 Fed. (2d) 714, 27 AFTR 906. But the facts here afford no opportunity to apply the rule. We have no postponement of the minor's right to enjoy the net income of the trust in the uncontrolled judgment and discretion of the trustee. The donor imposed the duty on the trustee "to apply and pay over" the net income to her son, and because he was a minor she granted discretion to the trustee as to whom such payment should be made until the son reached his majority. We find support for our conclusion in Commissioner v. Lowden (CCA 7), 131 Fed. (2d) 127, 30 AFTR 229; Commissioner v. Kempner (CCA 5), 126 Fed. (2d) 853, 28 AFTR 1524; Commissioner v. Brandegge (CCA 1), 123 Fed. (2d) 58, 62, 28 AFTR 225; Smith v. Commissioner (CCA 8), 131 Fed. (2d) 254, 30 AFTR 262; Elizabeth H. Fisher, 45 B.T.A. 958, affirmed (CCA 9), 132 Fed. (2d) 383, 30 AFTR 602, and like cases, although none of these authorities is squarely in point.

Since respondent increased the amount of the gift by the accrued interest on the bonds transferred, an adjustment not in dispute, the deficiency should be redetermined in accordance herewith and

Reviewed by the Court.

Decision will be entered under Rule 50.

Sternhagen, Leech and Kern, JJ., dissent. [35]

The Tax Court of the United States
Washington

Docket No. 110477

MADELEINE N. SHARP,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Court's Opinion, promulgated July 7, 1944, the respondent having filed a recomputation of tax on August 4, 1944, and the petitioner having filed an acquiescence in said recomputation on August 21, 1944, it is

Ordered and Decided: That there is no deficiency in gift tax for the calendar year 1938.

Enter:

Entered Aug 22, 1944.

(Signed) WILLIAM W. ARNOLD
Judge.

Copies served on both parties. [37]

In the United States Circuit Court of
Appeals for the Ninth Circuit

Docket No. 110477

JOSEPH D. NUNAN, Jr., Commissioner of Internal Revenue,

Petitioner on Review,

v.

MADELEINE N. SHARP,

Respondent on Review.

STIPULATION OF VENUE

Pursuant to the provisions of Section 1141 (b) (2) of the Internal Revenue Code, it is hereby agreed and stipulated that the decision of the Tax Court of the United States in this proceeding may be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit.

(Signed) J. P. WENCHEL, CAR

Chief Counsel, Bureau of Internal Revenue, Counsel for
Petitioner on Review.

WALTER AMES

Counsel for Respondent on
Review.

[Endorsed]: T.C.U.S. Filed Nov. 9, 1944. [38]

[Title of Circuit Court of Appeals and Cause.]

PETITION FOR REVIEW AND ASSIGN-
MENTS OF ERROR

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now Comes the Commissioner of Internal Revenue, petitioner on review in the above-entitled proceeding, by his attorneys, Samuel O. Clark, Jr., Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and John T. Rogers, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I.

Jurisdiction

That the petitioner on review (hereinafter referred to as the Commissioner) is the duly appointed, qualified, and acting Commissioner of Internal Revenue, appointed and holding his office by virtue of the laws of the United States; that the respondent on review, Madeleine N. Sharp (hereinafter referred to as the taxpayer), is an individual with her principal office at 1425 Bank of America Building, San Diego, California; that the taxpayer filed her gift tax return for the calendar year 1938 with the Collector of Internal Revenue for the Second Collection District of New York; however, pursuant to the provisions of [39] Section 1141 (b)(2) of the United States Internal Revenue Code, it has been stipulated by the parties hereto that the decision of The Tax Court of the United States in this proceeding may be reviewed by the

United States Circuit Court of Appeals for the Ninth Circuit, wherein this review is sought.

The Commissioner seeks a review of the decision of The Tax Court of the United States pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

II.

Nature of Controversy

On September 20, 1938, the taxpayer executed an agreement between herself as donor and/or trustor and the Title Guarantee and Trust Company of New York City (hereinafter referred to as the trustee), as trustee, for the benefit of Donald Nichols Sharp (hereinafter referred to as the beneficiary), her son, who was born on September 9, 1922. On the same date taxpayer transferred to the trustee cash and securities having a fair market value of \$252,090.79.

The present value of the right to receive income from the trust estate established by the agreement of September 20, 1938, was in excess of \$5,000.00 at that date.

On January 12, 1942, the Commissioner, in accordance with the provisions of the existing Internal Revenue laws, advised the taxpayer by registered mail that the determination of her gift tax [40] liability for the calendar year 1938 disclosed a deficiency of \$750.00. Thereafter, on April 9, 1942, the taxpayer filed an appeal from said notice of deficiency with the United States Board of Tax Appeals (now The Tax Court of the United States),

and in due time the Commissioner filed his answer to said petition. This cause came on for hearing before the Honorable William W. Arnold, Judge of the Tax Court, on September 23, 1943, upon stipulation of facts of the parties. A further stipulation of facts of the parties was filed with the Tax Court on June 27, 1944. On July 7, 1944, the Tax Court promulgated its opinion herein, and on August 22, 1944, entered its decision that there is no deficiency in gift tax for the calendar year 1938.

The Tax Court, in its opinion, held that the trustee had no discretionary powers under the terms of said trust instrument as to the payment of the income therefrom to the beneficiary, and that such discretionary power as the trustee had in regard thereto was whether it would make the required payment to the beneficiary's mother (taxpayer herein, or his guardian, or other person designated by the taxpayer, or whether the trustee itself would expend the income in such manner as would benefit the beneficiary. Therefore, the Tax Court held that the taxpayer should be allowed a \$5,000.00 exclusion with regard to said gift under the provisions of Section 504 (b) of the Revenue Act of 1932.

III.

Assignments of Error

That the Commissioner of Internal Revenue, being aggrieved by [41] the opinion and decision of The Tax Court of the United States in this proceeding, hereby petitions for a review of said opinion and decision by the United States Circuit

Court of Appeals for the Ninth Circuit, and for the correction of the manifest errors which therein occurred and intervened to his prejudice. The errors committed by the Tax Court, which are relied upon by the Commissioner as the basis of this petition for review, are as follows:

The Tax Court of the United States erred:

1. In holding and deciding that the gift involved herein is one of the present interest.

2. In failing to hold and decide that the gift involved herein is one of future interest.

3. In holding and finding that the trustee had no discretion with respect to paying over the trust income; and that the provisions of the trust instrument for accumulation of income were purely precautionary and constituted no limitation upon the duty of the trustee to apply and pay over the entire net income of the trust for the benefit of the beneficiary.

4. In failing to hold and find that the distribution of the income to the beneficiary of the trust involved herein was subject to the uncontrolled judgment and discretion of the trustee.

5. In holding and finding that there was no postponement of the beneficiary's right to enjoy the net income of the trust in the uncontrolled judgment and discretion of the trustee. [42]

6. In holding and finding that the donor of the trust involved herein imposed the duty on the trustee "to apply and pay over" the net income to her son, and because he was a minor she granted

discretion to the trustee as to whom such payment should be made until the son reached his majority.

7. In that its opinion and decision are contrary to the law and the regulations, and are not supported by substantial evidence.

8. In ordering and deciding that there is no deficiency in gift tax for the calendar year 1938.

9. In failing to order and decide that there is a deficiency in gift tax for the calendar year 1938, in the amount of \$750.00, due by the taxpayer herein.

Wherefore, the Commissioner petitions that said opinion and decision of The Tax Court of the United States be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit; that a transcript of the record be prepared in accordance with the law and the rules of said Court and be transmitted to the Clerk of the said Court for filing, and that appropriate action be taken to the end that the errors herein complained of may be reviewed and corrected by said Court.

(Sgd.) SAMUEL O. CLARK, Jr., CAR
Assistant Attorney General.

(Sgd.) J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue, At-
torneys for Petitioner on Review.

Of Counsel:

JOHN T. ROGERS,
Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: T. C. U. S. Filed Nov. 9, 1944.

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To: Walter Ames, Esq.,
1410 Bank of America Building,
San Diego, California.

You are hereby notified that the Commissioner of Internal Revenue did, on the 9th day of November, 1944, file with the Clerk of The Tax Court of the United States at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Tax Court heretofore rendered in the above-entitled case. A copy of the petition for review is hereto attached and served upon you.

Dated this 9th day of November, 1944.

Signed J. P. WENCHEL, CAR

Chief Counsel,

Bureau of Internal Revenue.

Service of the above and foregoing notice, together with a copy of the petition for review mentioned therein, is hereby acknowledged this 14th day of November, 1944.

(Sgd.) WALTER AMES

Counsel for Respondent on
Review.

[Endorsed]: T. C. U. S. Filed Nov. 24, 1944.

[44]

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To: Raymond M. Wansley, C. P. A.,
1425 Bank of America Building,
San Diego, California.

You are hereby notified that the Commissioner of Internal Revenue did, on the 9th day of November, 1944, file with the Clerk of The Tax Court of the United States at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Tax Court heretofore rendered in the above-entitled case. A copy of the petition for review is hereto attached and served upon you.

Dated this 9th day of November, 1944.

Signed J. P. WENCHEL, CAR

Chief Counsel,

Bureau of Internal Revenue.

Service of the above and foregoing notice, together with a copy of the petition for review mentioned therein, is hereby acknowledged this 14 day of November, 1944.

(Sgd.) RAYMOND M. WANSLEY

For Respondent on Review.

[Endorsed]: T. C. U. S. Filed Nov. 24, 1944.

[45]

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To: Madeleine N. Sharp,
1425 Bank of America Building,
San Diego, California.

You are hereby notified that the Commissioner of Internal Revenue did, on the 9th day of November, 1944, file with the Clerk of The Tax Court of the United States at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Tax Court heretofore rendered in the above-entitled case. A copy of the petition for review is hereto attached and served upon you.

Dated this 9th day of November, 1944.

Signed J. P. WENCHEL, CAR

Chief Counsel,

Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review mentioned therein, is hereby acknowledged this 17 day of November, 1944.

(Sgd.) MADELEINE NICHOLS
SHARP

Respondent on Review.

[Endorsed]: T. C. U. S. Filed Nov. 24, 1944.

[46]

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS TO BE
RELIED UPON

Now Comes the Commissioner of Internal Revenue, petitioner on review in the above-entitled cause, by and through his attorneys, Samuel O. Clark, Jr., Assistant Attorney General, and J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and hereby states that he intends to rely upon the following points in this proceeding:

That the Tax Court of the United States erred:

1. In holding and deciding that the gift involved herein is one of present interest.

2. In failing to hold and decide that the gift involved herein is one of future interest.

3. In holding and finding that the trustee had no discretion with respect to paying over the trust income; and that the provisions of the trust instrument for accumulation of income were purely precautionary and constituted no limitation upon the duty of the trustee to apply and pay over the entire net income of the trust for the benefit of the beneficiary.

4. In failing to hold and find that the distribution of the income to the beneficiary of the trust involved herein was subject [47] to the uncontrolled judgment and discretion of the trustee.

5. In holding and finding that there was no postponement of the beneficiary's right to enjoy the net income of the trust in the uncontrolled judgment and discretion of the trustee.

6. In holding and finding that the donor of the trust involved herein imposed the duty on the trustee "to apply and pay over" the net income to her son, and because he was a minor she granted discretion to the trustee as to whom such payment should be made until the son reached his majority.

7. In that its opinion and decision are contrary to the law and the regulations, and are not supported by substantial evidence.

8. In ordering and deciding that there is no deficiency in gift tax for the calendar year 1938.

9. In failing to order and decide that there is a deficiency in gift tax for the calendar year 1938, in the amount of \$750.00, due by the taxpayer herein.

(Sgd.) SAMUEL O. CLARK, Jr., CAR

Assistant Attorney General

J. P. WENCHELL, CAR

Chief Counsel,

Bureau of Internal Revenue.

Service of a copy of the within Statement of Points to be relied on is hereby admitted this 4th day of December, 1944.

(Sgd.) WALTER AMES

Attorney for Respondent on
Review

[Endorsed]: T. C. U. S. Filed May 21, 1945.

[48]

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PORTIONS OF RECORD,
PROCEEDINGS AND EVIDENCE TO BE
CONTAINED IN RECORD ON REVIEW

To the Clerk of the Tax Court of the United
States:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Ninth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of proceedings before the Tax Court.
2. Pleadings before the Tax Court:
 - (a) Petition, together with annexed Exhibit A (Notice and Statement of Deficiency.)
 - (b) Answer
3. (a) Stipulation of Facts, together with attached documents filed with the Tax Court on September 23, 1943.
 - (b) Amended Stipulation of Facts filed with the Tax Court on June 27, 1944.
4. Opinion of the Tax Court promulgated July 7, 1944.
5. Decision of the Tax Court entered August 22, 1944. [49]
6. Petition for Review, together with Proof of

Service of notice of filing petition for review and of service of copy of petition for review.

7. Stipulation of venue.

8. Statement of points to be relied upon.

9. Any and all orders made by the Court with respect to enlargement of time for the preparation and transmission of the record on review.

10. This designation of portions of record, proceedings, and evidence to be contained in the record on review.

Said transcript to be prepared, certified and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

(Sgd.) SAMUEL O. CLARK, Jr., CAR

Assistant Attorney General

Signed J. P. WENCHEL, CAR

Chief Counsel

Bureau of Internal Revenue

Service of a copy of the within Designation of Portions of Record, etc., is hereby admitted this 4th day of December, 1944.

(Sgd.) WALTER AMES

Attorney for Respondent on
Review.

[Endorsed]: T. C. U. S. Filed May 21, 1945.

[50]

The Tax Court of the United States
Washington

Docket No. 110477

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

MADELEINE N. SHARP,

Respondent.

CERTIFICATE

I, B. D. Gamble, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 50, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above number and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 25 day of May, 1945.

[Seal]

B. D. GAMBLE

Clerk,

The Tax Court of the
United States.

[Endorsed]: No. 11064 United States Circuit Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. Madeleine N. Sharp, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed May 28, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 11064

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

MADELEINE N. SHARP, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES

BRIEF FOR THE PETITIONER

SAMUEL O. CLARK, Jr.,

Assistant Attorney General.

SEWALL KEY,

J. LOUIS MONARCH,

MURIEL S. PAUL,

Special Assistants to the Attorney General.

FILED

SEP 1 1945

PAUL P. O'BRIEN,
CLERK

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11064

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

MADELEINE N. SHARP, RESPONDENT

*ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Tax Court of the United States (R. 29-38) may be found in 3 T. C. 1062.

JURISDICTION

The petition for review involves a deficiency of \$750 in gift taxes for the year 1938. The taxpayer filed her gift tax return for the year 1938 with the Collector of Internal Revenue for the Second Collection District of New York. (R. 41.) On January 12, 1942, the Commissioner mailed a statutory notice of deficiency to the taxpayer. (R. 6-9.) On April 6, 1942, the taxpayer filed a petition with the Tax Court for redetermination of her gift tax liability, pursuant to Section 1012 of the Internal Revenue Code. (R. 3-5.) The final order and decision of the Tax Court, deciding that

there was no deficiency in gift tax was entered on August 22, 1942. (R. 39.) It has been stipulated (R. 40) by the parties that the decision of the Tax Court may be reviewed by the Circuit Court of Appeals for the Ninth Circuit and the petition for review was filed November 9, 1944 (R. 41-45), pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

QUESTION PRESENTED

Whether a gift in trust for the taxpayer's minor son was a gift of "future interests in property" and hence not within the \$5,000 exclusion provision of Section 504 (b) of the Revenue Act of 1932.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 502. COMPUTATION OF TAX.

The tax for each calendar year shall be an amount equal to the excess of—

(1) a tax, computed in accordance with the Rate Schedule hereinafter set forth, on the aggregate sum of the net gifts for such calendar years, over

(2) a tax, computed in accordance with the Rate Schedule, on the aggregate sum of the net gifts for each of the preceding calendar years.

* * * * *

SEC. 504. NET GIFTS.

(a) *General Definition.*—The term "net gifts" means the total amount of gifts made during the calendar year, less the deductions provided in section 505.

(b) *Gifts Less Than \$5,000.*—In the case of gifts (other than of future interests in prop-

erty) made to any person by the donor during the calendar year, the first \$5,000 of such gifts to such person shall not, for the purposes of subsection (a), be included in the total amount of gifts made during such year.

Treasury Regulations 79 (1936 ed.):

ART. 11. *Future interests in property*.—No part of the value of a gift of a future interest may be excluded in determining the total amount of gifts made during the calendar year. “Future interests” is a legal term, and includes reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commence in use, possession, or enjoyment at some future date or time. * * *

STATEMENT

The relevant facts as stipulated (R. 10–11), as amended (R. 27–28), and as found by the Tax Court are as follows:

On September 20, 1938, Madeleine N. Sharp created a trust for the benefit of her son, Donald Nichols Sharp, naming the Title Guarantee and Trust Company as trustee. (R. 10.) On the same date she transferred to the trustee cash and securities having a fair market value of \$252,090.79. Donald Nichols Sharp was born on September 9, 1922, and was 16 years of age on September 20, 1938, the date on which the trust agreement was executed. (R. 11.)

On September 20, 1938, the present value of the right to receive the income from the trust established

on that date was in excess of \$5,000. (R. 11.) The trust instrument provided in parts as follows (R. 12-13):

Article First: A. To hold, manage, invest, and reinvest said trust estate, and to collect and receive the rents, interest, income and dividends (hereinafter referred to as income) therefrom and after paying the proper charges against the same, to apply and pay over to the use and ~~for~~ the benefit of my son Donald Nichols Sharp the net income therefrom during his minority, and upon his reaching his majority to pay the net income to my said son Donald Nichols Sharp during his life. The Trustee may make any payment of any income thus applicable to the use of my son Donald Nichols Sharp, during his minority, by paying the same to his mother, or guardian of his property, or other person or corporation designated by the Donor (without obligation to look to the proper application thereof by the person receiving it) or by expending it in such manner as the Trustee, in its discretion, believes will benefit my son. Any balance of income shall be accumulated until the arrival of my son, Donald Nichols Sharp at majority, at which time the Trustee shall pay over the said accumulated income to my son Donald Nichols Sharp.

It was further provided that the trust was to terminate at the death of the son with provisions for distributions of principal to his children. (R. 13.)

In determining the taxpayer's gift tax for the year 1938 the Commissioner disallowed a \$5,000 exclusion from taxpayer's net gifts for that year on the ground

that the gift in trust to her son was a gift of a future interest. (R. 35.)

STATEMENT OF POINTS TO BE URGED

The Commissioner's assignments of error, all of which are here relied upon, appear in the record at pages 43-45. They may be summarized by the simple statement that the Tax Court erred in holding the gift in question was a gift of a present interest which entitled the taxpayer to an exclusion of \$5,000 in computing her gift tax liability for the year 1938.

SUMMARY OF ARGUMENT

A reasonable construction of the trust instrument involved requires the legal conclusion that the income from the trust was a gift of a future interest to the donor's minor son. The decision below rests upon the ground that the specific direction to the trustee to accumulate any balance of income during the son's minority was "purely precautionary and constituted no limitations upon the trustee to apply and pay over the net income to the son," during his minority. As shown by other language in the trust instrument this conclusion is erroneous. Only so much of the income as was applicable to the use of the son was to be applied or paid over, and there is no showing in the record as to what this amount may be. Also it is specifically provided that the accumulated surplus shall be paid over to the son upon his reaching his majority. Thus it is evident that the use, possession or enjoyment of some portion of the income may be postponed, and under the terms of the statute the taxpayer is not entitled to the exclusion claimed.

ARGUMENT

The gift in trust for the benefit of a minor beneficiary was a gift of a future interest as to which no exclusion was allowable in computing taxpayer's gift tax for the year 1938

Section 504 (b) of the Revenue Act of 1932, *supra*, excludes from a taxpayer's net gifts the first \$5,000 of gifts (other than of future interests in property) made to any person during the taxable year. The taxpayer here claims an exclusion of \$5,000 for the year 1938 with respect to the gift made in trust to her son in that year. If, as the Commissioner contends, the gift to her son was one of a future interest, the taxpayer is not entitled to the exclusion.

Treasury Regulations 79, Article 11, *supra*, defines future interests as follows:

"Future interests" is a legal term, and includes reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commence in use, possession, or enjoyment at some future date or time.

As recently stated in *Commissioner v. Disston* (Sup. Ct.), decided June 4, 1945 (C. C. H. Inheritance, Estate & Gift Tax Service, par. 10,207), this definition has been approved repeatedly. *United States v. Pelzer*, 312 U. S. 399; *United States v. Ryerson*, 312 U. S. 260; *Fondren v. Commissioner*, 324 U. S. 18.

The precise question here is whether, under the terms of the trust instrument, there is a possibility that the beneficiary's use, possession or enjoyment of any part of the income may be postponed. *Commis-*

sioner v. *Taylor*, 122 F. 2d 714, (C. C. A. 3rd) certiorari denied, 314 U. S. 699.¹ It is the Commissioner's contention that "Article First" of that instrument specifically provides for some measure of future use or enjoyment. After first directing (R. 12) that the trustee "apply and pay over to the use and for the benefit of my son Donald Nichols Sharp the net income therefrom during his minority" it is provided (R. 13):

Any balance of income shall be accumulated until the arrival of my son Donald Nichols Sharp at majority, at which time the Trustee shall pay over the said accumulated income to my son Donald Nichols Sharp. [Italics supplied.]

The basis of the Tax Court's decision that the gift was one of a present interest in the trust income, was that the donor imposed the duty on the trustee to apply and pay over the entire net income to the son during his minority. In reaching this conclusion it was necessary for the Tax Court to also conclude (R. 37) that the provision for accumulating any balance of income was "purely precautionary and constituted no limitation upon the trustee to apply and pay over the net income to the son." We submit that there is no reasonable basis for wholly disregarding the provision for the accumulation of income for the

¹ Although the Third Circuit Court of Appeals specifically overruled the *Taylor* decision in *Disston v. Commissioner*, 144 F. 2d 115, 119, the Supreme Court cited it with approval in *Fondren v. Commissioner*, *supra* (p. 21), and by implication approved it in reversing the Circuit Court's decision in the *Disston* case.

minor beneficiary. A cardinal rule of construction of a trust instrument is that the intent of the settlor as evinced by the language of the instrument must prevail and that intent must be collected from the whole instrument taken together.

In the *Disston* case, *supra*, the first direction of each trust was to accumulate the net income until the minor reached 21. The Supreme Court observed:

If that were all, it would again be clear that a future interest was created by the postponement of enjoyment. A later paragraph directs the trustees however, "to apply * * * such income therefrom as may be necessary for the education, comfort and support of the respective minors," and to accumulate the remainder.

In the instant case, the first direction of the trust is to apply and pay over the income for the use and benefit of the son during his minority. If that were all, it might well be that a present interest was created. It appears to be settled that if income of a trust is required to be distributed periodically, as annually, the gift of the income is one of a present interest. See *Fondren v. Commissioner*, *supra*. However, such is not the case. The same paragraph then specifically provides for the accumulation of the balance of the income which is not applicable to the use of the minor.

In providing the manner in which the trustee may make payments of income during the son's minority the payments are described (R. 13) as "any payment of any income thus applicable to the use of my son." [Italics supplied.] Certainly this sentence suggests that some part of the income may not be applicable

to the use of the minor and when coupled with the next succeeding sentence, which positively directs accumulation of *any balance*, it is clear that the intent of the donor was to distinguish between income which was applicable to the use and for the benefit of the son during his minority and that income which should be held until he reached majority.

It should be noted that the words "use and benefit" are employed only with respect to the son's minority. In contrast to the provision regarding minority it is simply stated (R. 12-13) "and upon his reaching his majority to pay the net income to my said son Donald Nichol Sharp during his life." When coupled with other provisions of that paragraph it seems clear that the words "use and benefit" were used as words of limitation.² It is immaterial for tax purposes that the exact administration of that limitation is not expressed. The fact that a balance of income was con-

² In the Tax Court the taxpayer cited the case of *Gasquet v. Pollock*, 1 App. Div. 512 (N. Y.), 37 N. Y. S. 357, affirmed, 158 N. Y. 734, 53 N. E. 1125, as holding that where a trust instrument directed the income to be applied to the use of the beneficiary, with no discretion given the trustees, the beneficiary was entitled to have the entire income paid over as it accrued. However, in that case, the instrument made no provision whatever for accumulating any income and the court particularly observed that fact. The case is therefore no authority in the instant case. On the other hand, it has been held that where a testamentary trustee was directed to apply and pay the income for the education of minor beneficiaries, there was a clear implication that the trustee should reserve any surplus income over and above the money to be expended for the limited purpose fixed by the testatrix, although there was no mention whatever, in the instrument, of accumulating any income. *In re King's Estate*, 121 Misc. 298 (N. Y.), 200 N. Y. S. 829.

templated and that the trustee was directed to accumulate it is sufficient.

There is no indication from the face of the trust instrument or the surrounding circumstances that a steady flow of some ascertainable portion of income to the minor would be required for his use and benefit. The existence of a duty to apply the income for the minor's use and benefit gives no more clue to the amount that will be *applicable* for that purpose, than did the duty to apply income necessary for the education, comfort and support of the minors in the *Disston* case, *supra*. Taxpayer is entitled to no presumption that the entire income from a \$250,000 fund will be needed and therefore become applicable to the use and benefit of the taxpayer's minor son. Whether or not a court of equity might intervene does not meet the question. In cases where the instrument specifically states that payment or withholding of income rests in the full discretion of the trustee, a court of equity may intervene. *Welch v. Paine*, 130 F. 2d 990 (C. C. A. 1st); *Commissioner v. Brandegee*, 123 F. 2d 58 (C. C. A. 1st); *French v. Commissioner*, 138 F. 2d 254 (C. C. A. 8th). In fact, in cases where a minor has insufficient means of support and education, a court of equity may no doubt intervene even though the trustee has no power to apply any income to the use of the minor. See *Matter of Wagner*, 81 App. Div. 163 (N. Y.), 80 N. Y. S. 785; *Matter of Howland*, 37 Misc. 114 (N. Y.), 74 N. Y. S. 950, reversed on other grounds, 75 App. Div. 207 (N. Y.), 77 N. Y. S. 1025.

There is nothing in this record to indicate that the parents of the minor beneficiary were unable or unwilling to support and educate their child and we believe that this would have to be shown before a court of equity would compel the trustee to apply or pay over an amount which it had in good faith accumulated as a *balance* above that for the reasonable use and benefit of the minor.

The Tax Court stated (R. 38) that it found support for its conclusion, that this gift was one of a present interest, in *Commissioner v. Lowden*, 131 F. 2d 127 (C. C. A. 7th), and *Fisher v. Commissioner*, 45 B. T. A. 958, appealed on another issue, 132 F. 2d 383 (C. C. A. 9th). We do not think either of those cases offer such support because in each there were two vital facts which are absent in the instant case. In each, the net income was directed to be distributed *annually*. In neither was there any mention of accumulation of any part of the income. Also, in *Smith v. Commissioner*, 131 F. 2d 254 (C. C. A. 8th), upon which the Tax Court also relied, the trust instrument made no specific provision for accumulation of income or possible postponement of its enjoyment by the beneficiary, but the Eighth Circuit held that the dominant purpose of the settlor, as gathered from the whole instrument, repelled the idea of accumulation or postponement. The validity of this premise is doubtful and was criticized by this Court in *Fisher v. Commissioner*, *supra* (p. 386) as resting on "an insecure foundation, being based, as it is, on the court's view of the purpose of the settlor." Also, in *Welch v.*

Paine, supra, this same theory was criticized (p. 992) as causing—

uncertainty and confusion, depending as it would upon a weighing of the relative emphasis placed by the settlor on accumulation and current distribution in defining the trustee's discretionary power.

Nor do we think any support for the decision below may be found either in *Commissioner v. Kempner*, 126 F. 2d 853 (C. C. A. 5th), or in *Commissioner v. Brandegee, supra*. In the former, the gift in trust was of non-interest bearing notes of third persons, payable in the future. The court held that the mere fact that the notes were not by their terms payable until a future time did not make them gifts of future interests. In the *Brandegee* case, the trustees were given discretionary power to pay off any mortgages, either from the principal or the income of the trust, before paying any income to the beneficiaries. In remanding the case for a determination of whether there were any mortgages outstanding at the date of the gift in trust, the court merely stated (p. 62) that "in ordinary usage a life tenant under a trust, having the right to the immediate beneficial enjoyment of the income, is considered as having a present interest." We find nothing in that language to support the decision below because it assumes, as the answer, the very issue in this case.

The fact that all of the income *might* be applied or paid to the beneficiary currently is not sufficient to make the beneficiary's interest a present one. Unless

it is proved that all of the income or some reasonably certain portion thereof would be paid or applied currently the difficulty of valuing the present interest arises. See H. Rep. No. 708, 72nd Cong., 1st Sess., p. 29 (1939-1 Cum. Bull. (Part 2) 457).

We submit that this taxpayer has failed to prove the facts which would entitle her to the exclusion which Congress has granted for certain types of gifts only. *New Colonial Co. v. Helvering*, 292 U. S. 435. The purpose of the exclusion is simply to avoid the burden of recording and reporting numerous small gifts, which would be disproportionate to the revenue produced. The amount³ of the exclusion is made sufficiently large to cover most gifts such as wedding and Christmas gifts. (H. Rep. No. 708, *supra*.)

The least that may be said of this trust instrument is that it might be interpreted as providing conflicting directions to the trustee but there is no legal basis for ignoring one or the other in order to prove that the interest in question is an interest with respect to which the exclusion is allowable, particularly since the record discloses none of the circumstances under which the gifts were made. See *Fondren v. Commissioner*, *supra*, (pp. 21-22).

³ The amount of the exclusion was reduced to \$4,000 in the Revenue Act of 1938, c. 289, 52 Stat. 447, Section 505, before its reduction to \$3,000 in the Revenue Act of 1942, c. 619, 56 Stat. 798, Section 454 (26 U. S. C. 1940 ed., Supp. IV, Sec. 1003). The report of the House Committee relating to the latter act indicates that the exclusion would be abolished completely except for the administrative difficulties which would arise if that were done. H. Rep. No. 2333, 77th Cong., 2d Sess., p. 37 (1942-2 Cum. Bull. 372).

CONCLUSION

The Tax Court erred in holding that the taxpayer is entitled to the exclusion claimed. Its decision should be reversed.

Respectfully submitted,

SAMUEL O. CLARK, Jr.,
Assistant Attorney General.

SEWALL KEY,
J. LOUIS MONARCH,
MURIEL S. PAUL,

Special Assistants to the Attorney General.

SEPTEMBER, 1945.

In the United States
Circuit Court of Appeals
For the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

MADELEINE N. SHARP, RESPONDENT

On petition for review of the decision of The Tax
Court of the United States

Brief for the Respondent

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FILED

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CLERK

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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

No. 11064

COMMISSIONER OF INTERNAL REVENUE, PETITIONER
v's.

MADELEINE N. SHARP, RESPONDENT

**On petition for review of the decision of The Tax
Court of the United States**

Brief for the Respondent

OPINION BELOW

The opinion of the Tax Court of the United States (R. 29-38) may be found in 3 T. C. 1062.

JURISDICTION

The petition for review involves a deficiency of \$750 in gift taxes for the year 1938. The taxpayer filed her gift tax return for the year 1938 with the Collector of Internal Revenue for the Second Collection District of New York. (R. 41.) On January 12, 1942, the Commissioner mailed a statutory notice of deficiency to the taxpayer. (R. 6-9.) On April 6, 1942, the taxpayer filed a petition with the Tax Court for redetermination of her gift tax liability, pursuant to Section 1012 of the Internal Revenue Code.

(R. 3-5.) The final order and decision of the Tax Court, deciding that there was no deficiency in gift tax was entered on August 22, 1942. (R. 39.) It has been stipulated (R. 40) by the parties that the decision of the Tax Court may be reviewed by the Circuit Court of Appeals for the Ninth Circuit and the petition for review was filed November 9, 1944 (R. 41-45), pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

QUESTION PRESENTED

Whether a gift in trust for the taxpayer's minor son was a gift of "future interests in property" and hence not within the \$5,000 exclusion provision of Section 504 (b) of the Revenue Act of 1932.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 502. COMPUTATION OF TAX.

The tax for each calendar year shall be an amount equal to the excess of—

(1) a tax, computed in accordance with the Rate Schedule hereinafter set forth, on the aggregate sum of the net gifts for such calendar years, over

(2) a tax, computed in accordance with the Rate Schedule, on the aggregate sum of the net gifts for each of the preceding calendar years.

* * * * *

SEC. 504. NET GIFTS.

(a) *General Definition.*—The term "net gifts" means the total amount of gifts made during the calendar year, less the deductions provided in section 505.

(b) *Gifts Less Than \$5,000.*—In the case of gifts (other than of future interests in property) made to any person by the donor during the calendar year, the first \$5,000 of such gifts to such person shall not, for the purposes of subsection (a), be included in the total amount of gifts made during such year.

Treasury Regulations 79 (1936 ed.):

ART. 11. *Future Interests in Property.*—No part of the value of a gift of a future interest may be excluded in determining the total amount of gifts made during the calendar year. "Future interests" is a legal term, and includes reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commence in use, possession, or enjoyment at some future date or time.***

STATEMENT

The respondent adopts the statement of facts set forth in petitioner's brief, pages 3 to 5, inclusive. For purposes of convenience Article First of the trust instrument involved is set forth herein in full:

Article First: A. To hold, manage, invest, and reinvest said trust estate, and to collect and receive the rents, interest, income and dividends (hereinafter referred to as income) therefrom and after paying the proper charges against the same, to apply and pay over to the use and for the benefit of my son Donald Nichols Sharp the net income therefrom during his minority, and upon his reaching his majority to pay the net income to my said son Donald Nichols Sharp during his life. The Trustee may make any payment of any income thus applicable

to the use of my son Donald Nichols Sharp, during his minority, by paying the same to his mother, or guardian of his property, or other person or corporation designated by the Donor (without obligation to look to the proper application thereof by the person receiving it) or by expending it in such manner as the Trustee, in its discretion, believes will benefit my son. Any balance of income shall be accumulated until the arrival of my son, Donald Nichols Sharp at majority, at which time the Trustee shall pay over the said accumulated income to my son Donald Nichols Sharp.

SUMMARY OF ARGUMENT

The issue in this case turns upon a construction of the trust instrument. A reasonable construction of the trust instrument requires the conclusion that the interest of the donee beneficiary in the income of the trust was not limited to commence in use, possession or enjoyment at some future time. The donee beneficiary was entitled at all times to demand and possess the income of the trust and the trustee was under the express duty to apply and pay over the net income of the trust to the use and for the benefit of the donee. Since the interest of the donee was a present interest in the income of the trust the taxpayer is entitled to the exclusion claimed. The decision of the Tax Court is correct and should be affirmed.

ARGUMENT

The gift of the income of the trust for the benefit of a minor beneficiary was a gift of a present interest as to which the taxpayer was entitled to an exclusion allowable in computing taxpayer's gift tax for the year 1938.

The issue in this case turns upon an interpretation of the trust instrument. The question to be determined is whether the donor's minor son has a present interest in the trust income. The Supreme Court in *Fondren v. Commissioner*, 324 U. S. 18, 65 S. Ct. 499, 89 L. Ed. 449, has recently outlined some guiding principles to be applied in determining whether a gift is of a present or future interest. *Commissioner v. Disston* (Sup. Ct.) decided June 4, 1945, 89 L. Ed. 1202, C. C. H. Inheritance, Estate and Gift Tax Service, Paragraph 10,207, Prentice Hall Federal Tax Service, Paragraph 72,026. To be classed as a present interest, the donee must have the right presently to use, possess or enjoy and there must be no barrier of a substantial period of time imposed by the trust instrument between the will of the donee to enjoy what has been given him and that enjoyment. The same concept is implicit in Treasury Regulations 79, Article 11, *supra*, which defines future interest as follows:

“Future interests” is a legal term, and includes reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commence in use, possession, or enjoyment at some future date or time.

If the donee of the gift has the right presently to use, possess or enjoy the subject of the gift, the gift is not a future interest within the meaning of Treasury Regulations 79, Article 11, *supra*, or of the term “future interests” as used in Section 504 (b) of the Revenue Act of 1932, *supra*.

Applying these principles to the instant gift the question presented is did Donald Sharp, the donee of the income of the trust, have the right to use, possess or enjoy the income of the trust from its inception? As noted above, the question turns upon an interpretation of the trust instrument. The Tax Court (R. 36) has interpreted the trust instrument to confer upon Donald Sharp a present absolute right to the income. The interpretation of the Tax Court is clearly correct. "Article First" of the trust instrument (R. 12) contains a clear and unequivocal direction to the trustee " * * * to apply and pay over to the use and for the benefit of my son Donald Nichols Sharp the net income therefrom during his minority, and upon his reaching his majority to pay the net income to said son Donald Nichols Sharp during his life." No discretion is given to the trustee. No contingencies or conditions are provided for. No standard is established from which it may be inferred that the need of the beneficiary limits his right to the income. The trustee is directed flatly to apply and pay over to the use and for the benefit of the donee the net income during his minority. Where a trust instrument directs the income to be applied to the use of the beneficiary, no discretion being given to the trustee to apply only so much of the income as it might deem necessary for maintenance, the beneficiary is entitled to have the entire income paid over as it accrues. *Gasquet v. Pollock*, 37 N. Y. S. 357, 1 App. Div. 512, aff'd. 158 N. Y. 734, 53 N. E. 1125. It is clear that the above language of the trust instrument did not give the trustee any authority to accumulate income or any discretion to withhold income from the beneficiary for

any reason. Petitioner concedes in his Opening Brief (p. 8) "If that were all, it might well be that a present interest was created."

"Article First" of the trust instrument goes on to provide (R. 13) "The trustee may make any payment of any income thus applicable to the use of my son Donald Nichols Sharp, during his minority, by paying the same to his mother, or guardian of his property, or other person or corporation designated by the Donor (without obligation to look to the proper application thereof by the person receiving it) or by expending it in such manner as the Trustee, in its discretion, believes will benefit my son." This additional language of "Article First" (R. 13) in no way limits the absolute direction contained in the first sentence of "Article First" (R. 12) to apply and pay over the net income to the use and for the benefit of the donee. As pointed out by petitioner in his Opening Brief (p. 8), a cardinal rule of construction of a trust instrument is that the intention of the settlor as evidenced by the language of the instrument must prevail and that intent must be collected from the whole instrument taken together. Applying this rule to the instant trust instrument it is apparent that the second sentence of "Article First" (R. 13) is not a limitation upon the outright direction to apply and pay over the net income contained in the first sentence but is rather an implementation of that direction and is designed to protect the trustee in paying out income to a minor and to afford a workable method of handling the minor's funds. The trustee may pay the net income during minority to the donee's mother or guardian or other person or corpora-

tion designated by the donor *without obligation to look to the proper application thereof by the person receiving it* or the trustee may expend the net income in such manner as the trustee in his discretion believes will benefit the donee. This language is not designed to impose upon the trustee the duty of administering the donee's expenditure of funds but is designed to relieve the trustee of any duty in this regard and to make it possible for the trustee to carry out the mandate of the first sentence of "Article First" (R. 12) to apply and pay over the net income to the use and for the benefit of the donee without assuming the responsibility of ascertaining the use to which the funds are put. Thus interpreted, the first and second sentences of "Article First" (R. 12, 13) are consistent and each is given meaning. If the language of the second sentence is construed as a limitation on the absolute direction contained in the first sentence, the first sentence becomes meaningless. The first sentence of "Article First" (R. 12) contains the direction to pay the funds to the donee which creates an absolute right in the donee to presently demand, receive and possess the net income. The second sentence implements the first sentence by setting up the procedure for carrying out the direction and relieves the trustee of any duty to supervise the expenditure of funds by the donee or of seeking the appointment of a guardian of the donee or of paying the funds into court. Where the beneficiary of a trust who is entitled to the benefit of the income is an infant or otherwise under a legal incapacity, and the trust instrument makes no other provision, it is ordinarily the duty of the trustee to pay the income to his guardian or to pay it into court. *Gasquet*

v. *Pollock*, *supra*; *Matter of Taylor*, 234 App. Div. 892, 254 N. Y. S. 505, *aff'd*. 260 N. Y. 527, 184 N. E. 78. The second sentence of "Article First" (R. 13) is designed to give the trustee freedom in carrying out the absolute direction contained in the first sentence rather than to limit the duty to pay over.

The last sentence of "Article First" (R. 13) provides: "Any balance of income shall be accumulated until the arrival of my son Donald Nichols Sharp at majority, at which time the Trustee shall pay over the said accumulated income to my son Donald Nichols Sharp." The language of the last sentence is not a limitation upon the absolute direction to apply and pay over the net income to the use and for the benefit of the donee. It confers no discretionary power on the trustee to withhold income and to accumulate it. The last sentence of "Article First" (R. 13) with reference to the accumulation of "any balance of income" in no way limits the absolute right of the donee to possess income or the absolute duty of the trustee to apply and pay over income contained in the first sentence. Since the donee has the absolute right to possess income, his interest is not a future interest with the definition of "future interests" contained in Treasury Regulations 79, Article 11, *supra*. The provision for the accumulation of income is designed and intended to meet the contingency that the beneficiary may not exercise his right to possess all of the income and to put at rest any question as to the ultimate disposition of such income which the donee may not withdraw. See *In Re Kirby's Estate*, 231 N. Y. S. 408, 133 Misc. 152, appeal denied 239 N. Y. S. 390, 228 App. Div.

171. The fact that the beneficiary may not exercise his absolute right to possess all of the income and in this event the trustee is directed to accumulate such income does not change the beneficiary's absolute right to possess the income into a future interest or extinguish his absolute right to possess the income. Moreover, the trustee's duty to accumulate arises only if there is "any balance of income" which clearly means income which has not been applied or paid over as directed in the first sentence of "Article First" (R. 12). Since the first sentence clearly gives the trustee no discretion in the matter of the payment of income but places an absolute duty on the trustee to pay over the income and creates an absolute right in the donee to possess the income, it is equally clear that the trustee derives no added power or discretion from the last sentence directing the accumulation of "any balance of income" which the donee may allow to remain.

Furthermore, there is no direction contained in the trust instrument to segregate income into current and accumulated income. Accumulated income and current income are therefore equally subject to the right of the beneficiary during minority. During minority the donee's right would have to be exercised through his parent or guardian. After reaching majority he may personally enforce his right. However, Congress did not intend to penalize gifts to minors merely because the legal disability of their years precludes them for a time from receiving their income in hand currently or from directly exercising their legal rights. *Fondren v. Commissioner, supra*. Reasonably construed "Article First" (R. 12, 13) of the trust instrument gives no power

or discretion to the trustee to withhold or accumulate income. On the contrary, the trustee is expressly directed to apply and pay over the net income for the use and benefit of the donee. The trustee is directed to accumulate income only in the event that there remains "any balance of income" which the donee may not have withdrawn. This direction is merely a precautionary measure designed to put at rest any question as to who would be entitled to such income.

The language of the Supreme Court in *Commissioner v. Disston, supra*, referred to in petitioner's brief (pp. 12, 13), "But, even though the trustees were under a duty to apply the income for support, irrespective of outside sources of revenue, there is always the question of how much, if any, of the income can actually be applied for the permitted purposes" has no application to the instant case. The trust instrument in the Disston case directed the accumulation of income during minority and allowed the payment of income during minority only for certain limited purposes. The donee's right to income was conditioned upon a showing of need for the limited purposes. In the instant case there is no limitation upon the direction to apply and pay over the income to the use and for the benefit of the donee. The income could be used by the donee for any purpose and therefore a showing of need for a particular purpose is not required. The above language of the Supreme Court in the Disston case must be read in the light of the facts in that case which clearly showed that income was to be accumulated and paid out only for limited purposes. If the above language of the Disston case is to be applied in fact situations where the beneficiary of the income of a trust

has an absolute and unqualified right to the income, every gift of trust income will be a future interest unless the donee can show need for the income. Certainly the Supreme Court never intended such result but intended the language to apply to the particular facts before it in the Disston case.

The language of the Supreme Court in the Disston case with reference to the necessity of evidence indicating a steady flow of some ascertainable portion of income to the minor, referred to in petitioner's brief (p. 10), has no application to the instant case. As noted above, the trust instrument in the Disston case directed the accumulation of income and provided for payments to the beneficiaries for limited purposes only. In the instant case the trust instrument directs the payment of income by the trustee to the donee, without limitation as to purpose, and provides only for the accumulation of amounts which the donee as a matter of grace allows to remain. The trust instrument in the instant case itself provides the necessary indication that a steady flow of income to the minor is required by the terms of the trust. Since there is no condition, standard or need which must be satisfied or proved before the right of the beneficiary accrues, no evidence of need or use of income is required. A reasonable construction of the trust instrument giving effect to all of its provisions requires the conclusion that the interest of the donee of the income of the trust was not limited to commence in use, possession or enjoyment at some future time. The dominant purpose of the settlor, as gathered from the whole instrument, repels the idea of postponement. *Smith v. Commissioner*, 131 F(2) 254 (C. C. A. 8th).

The petitioner in his brief (p. 13) has referred to the legislative history of the section of the revenue laws in question in subsequent revenue acts and has pointed out that Congress has reduced the amount of the exclusion. We fail to see the relevancy of Congressional action taken subsequent to the enactment of the revenue act in question unless petitioner seeks to impute to Congress the intent to retroactively reduce the amount of the exclusion which Congress clearly did not do.

A reasonable construction of the trust instrument provides no basis for petitioner's contention contained in his brief (p. 13) that the trust instrument contains conflicting directions to the trustee. The trust instrument contains an absolute direction to apply and to pay over the net income to the use and benefit of the donee with express provisions for carrying out that mandate which are neither conflicting nor ambiguous.

CONCLUSION

The decision of the Tax Court is correct in holding that the taxpayer is entitled to the exclusion claimed. Its decision should be affirmed.

Respectfully submitted,

GRAY, CARY, AMES & DRISCOLL
Bank of America Building
San Diego, California
WALTER AMES
JAMES L. CHAPMAN

No. 11070 - 11071

United States
Circuit Court of Appeals
For the Ninth Circuit.

BYRON C. HANNA,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the Tax Court
of the United States

No. 11070

United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES:

For Taxpayer:

A. CALDER MACKAY, ESQ.,
ADAM Y. BENNION, ESQ.

For Comm'r:

EARL C. CROUTER, ESQ.

Docket No 739

BYRON C. HANNA,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1943

Feb. 10—Petition received and filed. Taxpayer notified. Fee paid.

Feb. 11—Copy of petition served on General Counsel.

Apr. 8—Answer filed by General Counsel.

Apr. 8—Request for hearing in Los Angeles, California, filed by General Counsel.

Apr. 14—Notice issued placing proceeding on Los Angeles, California calendar. Service of answer and request made.

1944

Feb. 29—Hearing set April 24, 1944 in Los Angeles, California.

Apr. 27, 28—Hearing had before Judge Hill on merits. Motion of counsel for petitioner to consolidate the cases and there being no objection by counsel for respondent, Ordered that the cases be consolidated. Entry of appearance of A. Calder Mackay, Esq., and A. Y. Bennion filed at hearing. Briefs due 6/13/44. Replies 6/28/44. (Simultaneous)

June 1—Motion for extension to July 1 and July 22, 1944 respectively, to file original and reply brief filed by General Counsel. 6/2/44 Granted.

June 12—Motion for extension to July 1 and July 22, 1944 respectively, to file original and reply brief filed by taxpayer. 6/13/44 Granted.

June 19—Transcript of hearing 4/27/44 filed.

June 23—Motion for extension to July 18, 1944 to file brief filed by taxpayer. 6/26/44 Granted.

July 1—Brief filed by General Counsel. Served 8/2/44.

July 12—Motion for extension to Aug. 3, 1944 to file original brief and to Aug. 24, 1944, respectively, to file reply brief, filed by taxpayer. 7/13/44 Granted.

Aug. 2—Brief filed by taxpayer. 8/2/44 Copy served.

1944

Aug. 17—Reply brief filed by General Counsel.

Aug. 24—Reply brief filed by taxpayer. Copy served.

1945

Jan. 15—Memorandum findings of fact and opinion rendered. Judge Hill. Decision will be entered for respondent. Copies served.

Jan. 15—Decision entered. Judge Hill. Div. 2.

[1*]

Apr. 12—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, with assignments of error filed by taxpayer.

Apr. 13—Proof of service filed by taxpayer.

May 19—Statement of points to be relied on and designation of parts of the record to be printed filed by taxpayer with proof of service thereon.

May 19—Stipulation adopting as a statement of evidence in this cause the statement of evidence prepared served and filed in the cause of Daisy May Hanna filed by taxpayer.

May 19—Designation of contents of record filed by taxpayer with proof of service thereon.

May 23—Certified copy of order from U. S. Circuit Court of Appeals, 9th Circuit, extending time to 6/22/45 to prepare and deliver the record. [2]

The Tax Court of the United States

Docket No. 739

BYRON C. HANNA,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency LA:IT:90D:PB, dated November 17, 1942; and as a basis of his proceeding, alleges as follows:

(1) The petitioner is an individual whose office is located at 1126 Pacific Mutual Building, Los Angeles, California. The return for the period here involved was filed with the Collector for the Sixth District of California.

(2) The Notice of Deficiency (a copy of which is attached and marked "Exhibit A") was mailed to the petitioner on November 17, 1942. [3]

(3) The taxes in controversy are income taxes for the calendar year 1940 in the amount of \$4,134.55. The Notice of Deficiency discloses a deficiency of \$4,143.24, which includes a deficiency for the calendar year 1939 in the amount of \$8.69, concerning which no question is raised.

(4) The determination of taxes set forth in the

said Notice of Deficiency for the calendar year 1940 is based on the following errors:

(a) The addition and inclusion in petitioner's income for said calendar year of the amount of \$28,821.94 as Partnership Income;

(b) The rejection of the application of section 107 of the Internal Revenue Code to a fee received by the partnership of Hanna and Morton in 1940, earned by services extending over a period of eight years.

(5) The facts upon which petitioner relies as the basis of this proceeding are as follows:

A. That at all times herein mentioned Byron C. Hanna and Harold C. Morton were equal copartners engaged in the practice of law in the city of Los Angeles, state of California, under the firm name and style of Hanna and Morton.

B. In July 1932, Mr. Etienne Lang, representing the Lazard family, consulted Harold C. Morton, partner of the undersigned, with reference to an important action to be brought on behalf of members of the Lazard family.

Thereafter, on August 14, 1932 Mr. Lang paid the firm of Hanna and Morton, of which petitioner is a partner, [4] \$2,500 for preliminary work, which included the drafting of a complaint to be submitted to the examination of French counsel.

At that point the service for which the \$2,500 was paid was complete. There was no obligation on the part of Hanna and Morton to render any further service or to proceed with any action, and no

obligation on the part of the clients to employ said firm any further.

C. Thereafter, in October 1932, Mr. Lang negotiated with Mr. Morton for the employment of Hanna and Morton to conduct said contemplated litigation.

Four different bases of compensation were suggested by Mr. Lang, and the basis of compensation set forth in the contract, a copy of which is annexed hereto and marked "Exhibit B" was selected and accepted by Hanna and Morton.

The contract provides for the immediate payment of \$30,000. The actual amount to be paid was \$27,500. The figure of \$30,000 was inserted at the suggestion of Mr. Lang so as to include and evidence the payment of the \$2,500 previously paid; but said amount of \$2,500 at that time had been entirely earned and paid on August 14, 1932, and represented compensation for an employment separate and distinct from work to be done under the terms of the contract. [5]

D. The sum of \$27,500 was paid to Hanna and Morton on October 15, 1932, upon the execution of the contract.

E. It was known to all parties at that time (October 15, 1932) that there would be large and substantial costs incurred in connection with the litigation to be prosecuted; and under the terms of the contract, Hanna and Morton assumed the absolute and unconditional obligation to defray the expense of such costs.

By executing the contract and receiving the sum of \$27,500 they also assumed the fiduciary obligation to apply as much of the said sum of \$27,500 as might be required, or all of it if all were required, to the payment of such expenses and costs.

F. At the time of the receipt of said sum of \$27,500 it was not contemplated by the parties that said sum or any part of it would constitute a fee or income to Hanna and Morton except and until all of the expense and costs of such litigation had been paid.

G. The fee for the professional services to be rendered in the litigation was contingent upon success and was to be determined by calculating a percentage of the recovery as set forth in the contract. [6]

H. Consistent with the method of accounting used by Hanna and Morton, the cash payment of \$27,500 was treated in the books of said partnership as a trust fund against which the direct expenses and costs of the litigation were charged. There was also transferred from said trust fund to the partners or to the general account of the partnership the sum of \$5,500, as follows:

October 15, 1932	\$2,000.00
October 31, 1932	1,500.00
May 1, 1933	1,000.00
October 31, 1936	1,000.00
<hr/>	
Total	\$5,500.00

These amounts were transferred to partially compensate the partnership for expenses in connection

with said employment, including salaries of lawyers employed by the partnership, stenographic help, stationery, etc., incident to the work of said employment and which expenses were paid out of the general funds of the partnership and not charged directly against said trust fund.

I. Consistent with the foregoing, the petitioner in each of the calendar years noted in the preceding paragraph, returned as income the amount received by him by reason of his participation in the amount [7] transferred to the General Account of the partnership during each such calendar year respectively as hereinbefore set forth.

Aside from such amounts, petitioner did not include in his income tax returns for the calendar year 1932 or for any year subsequent thereto until 1940, any other portion of said sum of \$27,500, but at all times treated and regarded the said sum, excepting the portions thereof transferred to the General Account of the partnership, as aforesaid, as trust funds which did not constitute income to petitioner.

J. In 1941 petitioner filed an income tax return reporting as income petitioner's community share in said fee upon the basis provided in section 107 of the Internal Revenue Code.

The Notice of Deficiency disallows this method of returning the said community income of petitioner resulting from said fee, and upon that basis adds to the community income of petitioner for the year 1940 the sum of \$28,821.94 upon which the deficiency for said year is calculated.

It is the addition of this amount of income to petitioner for the calendar year 1940, and the rejection of the application of section 107 of the Internal Revenue Code, which petitioner alleges to be erroneous. [8]

K. The litigation was successfully concluded in 1940, and the contingent fee collected. At that time the unexpended balance in the trust fund amounted to \$7,769.55. This was considered as income earned in that year and was transferred to the general funds of the partnership and added to the contingent fee.

L. The Notice of Deficiency is based upon the assumption that the cash payment of \$27,500 in 1932 was part of the total fee, and that as a result, an amount in excess of five per cent of the total fee was thus received.

The notice, however, ignores the fact that upon that theory the \$27,500 should have been returned as income in 1932, and would be assessable as income in 1932. This is a necessary consequence of the application of the theory upon which the notice of deficiency is based.

M. The undersigned alleges that the payment of \$27,500 received in 1932 was accepted subject to an unconditional obligation to pay and defray the expenses of said litigation in an indeterminable amount but nevertheless in an amount which it was then known would be very substantial. No part of said \$27,500 could be treated as income or profit until [9] the complete performance of the obligations of the contract, and therefore the portions

thereof, if any, returnable as income, could only be determined at such time.

N. Petitioner alleges that petitioner's part of the income under this contract was received as follows:

1932 Payment	\$ 27,500.00	
Litigation Costs during period		
1932 and 1940	\$ 14,230.45	
Portion taken into Partnership income		
in 1932, 1933 and 1936.....	5,500.00	19,730.45
		<hr/>
Determined by Events as Fee in 1940		\$ 7,769.55
Contingent Fee (1940)	\$114,018.19	
Paid to Other Lawyers.....	6,500.00	107,518.19
		<hr/>
Total Fee—1940		\$115,287.74
		<hr/> <hr/>

Petitioner further alleges that the application of section 107 of the Internal Revenue Code is permissible; and if said section is applied, there is no deficiency for the calendar year 1940.

O. Petitioner further alleges that if said section 107 of the Internal Revenue Code is not applicable, then the amount of \$27,500 should be assessed as income received by the partnership in 1932 and deducted from the total income received by the partnership in 1940; and that the additional tax assessed to petitioner in the Notice of Deficiency should be accordingly reduced. [10]

Wherefore, the petitioner prays that this Honorable Court may hear the proceeding and:

- (1) Determine that no deficiency exists for the calendar year 1940; or
- (2) If it be determined that section 107 of the

Internal Revenue Code is not applicable to the fee above referred to, then that the item of \$27,500 received in 1932 shall be treated as partnership income for that year; and that petitioner shall be assessed on his participation in said sum for that year, and that the amount so determined to have been received in 1932 shall be deducted from the amount of said fee charged to petitioner as having been received in 1940, and the deficiency reduced accordingly.

BYRON C. HANNA

In Propria Persona [11]

EXHIBIT A

Treasury Department

Internal Revenue Service

Twelfth Floor, U. S. Post Office and Courthouse

Los Angeles, Calif.

Nov. 17, 1942

Office of

Internal Revenue Agent in Charge

Los Angeles Division

LA:IT:90D:PB

Mr. Byron C. Hanna,

1126 Pacific Mutual Building,

Los Angeles, California.

Sir:

You are advised that the determination of your income tax liability for the taxable years ended De-

cember 31, 1939 and December 31, 1940 discloses a deficiency of \$4,143.24 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your returns by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,

Commissioner,

By GEORGE D. MARTIN (Signed)

Internal Revenue Agent in
Charge.

Enclosures:

Statement.

Form of waiver. [12]

Statement

LA:IT:90D:PB

Mr. Byron C. Hanna,
1126 Pacific Mutual Building,
Los Angeles, California.

Tax Liability for the Taxable Years Ended
December 31, 1939 and 1940

Income Tax.

Year	Liability	Assessed	Deficiency
1939	\$ 530.86	\$ 522.17	\$ 8.69
1940	9,544.52	5,409.97	4,134.55
Total	\$10,075.38	\$5,932.14	\$4,143.24

If you do not acquiesce in all of the adjustments making up the deficiency indicated, but desire to stop the accumulation of interest on that part of the deficiency resulting from adjustments to which you agree, please fill out the enclosed form of waiver, inserting therein the amount of the deficiency you desire to have assessed at once. The execution of the form for the agreed portion of the deficiency will not deprive you of your right to petition The Tax Court of the United States for a redetermination of the deficiency.

A copy of this letter and statement has been mailed to your representative, Mr. Edgar P. Lyons, 639 South Spring Street, Los Angeles, California, in accordance with the authority contained in the power of attorney executed by you. [13]

Adjustment to Net Income
Taxable Year Ended December 31, 1939

Net income as disclosed by return.....	\$10,355.79
Additional income:	
Partnership income	90.56
	<hr/>
Net income adjusted	\$10,446.35

Explanation of Adjustment

Your share of the net income from the partnership of Hanna and Morton has been increased in the amount of \$90.56.

Computation of Tax
Taxable Year Ended December 31, 1939

Net income adjusted	\$10,446.35
Less: Personal exemption	1,719.85
	<hr/>
Balance (surtax net income).....	\$ 8,726.50
Less: Earned income credit (10% of \$10,446.35).....	1,044.64
	<hr/>
Net income subject to normal tax.....	\$ 7,681.86
Normal tax at 4% on \$7,681.86.....	\$307.27
Surtax on \$8,726.50	223.59
	<hr/>
	\$ 530.86
Total income tax	\$ 530.86
Correct income tax liability	\$ 530.86
Income tax assessed:	
Original, account No. 251651	522.17
	<hr/>
Deficiency of income tax	\$ 8.69

[14]

Adjustments to Net Income
Taxable Year Ended December 31, 1940

Net income as disclosed by return	\$11,618.80
Additional income:	
(a) Partnership income	28,821.94
	<hr/>
Total	\$40,440.74

Reduction in income:

(b) Adjustment of "other income"..... 874.42

Net income adjusted\$39,566.32

Explanation of Adjustments

(a) Your share of the net income from the partnership of Hanna and Morton has been increased in the amount of \$28,821.94. Said partnership income is not entitled to be taxed under the provisions of section 107 of the Internal Revenue Code.

(b) The amount of \$1,748.85 reported as "other income" represents gain from the sale of a capital asset held for more than two years, and therefore 50% of this amount, or \$874.43, has been determined as long-term capital gain, in lieu of the income of \$1,748.85. [15]

Computation of Alternate Tax

Taxable Year Ended December 31, 1940

Net income adjusted\$39,566.32

Minus: Net long-term capital gain 874.43

Ordinary net income\$38,691.89

Less: Personal exemption\$1,020.26

Credit for dependent 400.00 1,420.26

Balance (Surtax net income)\$37,271.63

Less: Earned income credit 1,400.00

Net income subject to normal tax.....\$35,871.63

Normal tax at 4% on \$35,871.63.....\$1,434.87

Surtax on \$37,271.63 6,979.64

Partial tax\$ 8,414.51

Plus: 30% of \$874.43 net long-term capital gain..... 262.33

Alternative tax\$ 8,676.84

Computation of Tax

Taxable Year Ended December 31, 1940

Net income adjusted	\$39,566.32
Less: Personal exemption	\$1,020.26
Credit for dependent	400.00 1,420.26
Balance (surtax net income)	\$38,146.06
Less: Earned income credit	1,400.00
Net income subject to normal tax.....	\$36,746.06
Normal tax at 4% on \$36,746.06.....	\$1,469.84
Surtax on \$38,146.06	7,272.58
Total normal tax and surtax	\$ 8,742.42
Alternative tax	8,676.84
Defense tax (10% of \$8,676.84)	867.68
Total income tax	\$ 9,544.52
Correct income tax liability	\$ 9,544.52
Income tax assessed:	
Original, account No. 203573	5,409.97
Deficiency of income tax	\$ 4,134.55

[17]

EXHIBIT B

EMPLOYMENT CONTRACT

This Agreement of Employment made between the undersigned persons, hereafter referred to as the "clients", and Byron Hanna and Harold Morton, co-partners, practicing law, under the name of Hanna and Morton, hereafter referred to as the "attorneys", Witnesseth;

Whereas, the clients desire to have the attorneys file the necessary suit (or suits) on behalf of the clients as plaintiffs for an accounting and damages, or other relief, arising out of the sale in 1915 and

1917 of certain parts of Section 24, Township 26 South, Range 26 East, M. D. B. & M., Kern County, California, against the Anglo & London-Paris National Bank, Herbert Fleishhacker, California Star Oil Company, Security Oil Company, and others, as defendants; and

Whereas, the clients and the attorneys desire to enter into an agreement respecting the fees and costs and expenses of such litigation;

Now, Therefore, it is agreed as follows:

Fees and Costs

The clients will pay to the attorneys the sum of Thirty Thousand Dollars (\$30,000.00) and a contingent fee based on the amount of all sums or things of value recovered as a result of such suit (or suits) of 15% of the first million [18] dollars recovered and 10% of all sums in excess of one million dollars, payable only when and as received by the clients and in the same money or things of value as are received by the clients. Of said \$30,000.00 the attorneys have heretofore been paid \$2,500.00, and the balance of \$27,500.00 will be paid forthwith upon the execution of this agreement.

The said attorneys agree that in consideration thereof they will bear and pay all expenses and costs of such suit or suits, including all appeals, and hold the clients harmless by reason thereof.

The said attorneys are authorized to do all things appearing to them to be necessary and proper in protecting the rights of the clients with respect to said suit (or suits) and they agree to diligently prosecute the same to their best ability.

Settlement

Should a settlement of such controversies with the defendants be proposed or considered at any time, the question of whether such settlement should be made will be decided by a majority vote of the several clients and the attorneys, in which vote the attorneys shall have a 15% vote and the clients an 85% vote, the 85% being divided among the [19] clients in accordance with their respective interests in the controversies.

Provided further, that if any settlement be agreed upon, the attorneys shall receive a contingent fee of one-half of the amounts heretofore specified, that is to say, they will receive 7½% of the first million dollars recovered, and 5% thereafter.

1911 Sale

The attorneys agree that in the prosecution and investigation of the 1915 and 1917 sales referred to, they will endeavor to gather information as to the facts of a sale in 1911 made by the said Anglo & London-Paris National Bank of property in which the clients were interested. All such information will be placed at the disposal of the clients.

If it appears to the attorneys that a cause of action exists arising out of such 1911 sale, they will forthwith so advise the clients and will prepare the necessary complaint and prosecute a suit for relief by reason of such 1911 sale without further cash payment, upon an entirely contingent fee basis equal to that hereinbefore provided as to such 1915 and 1917 sales.

One or more duplicates of this agreement may be [20] signed. This contract effective only after signature of attorneys at Los Angeles, California.

[21]

State of California

County of Los Angeles—ss.

Byron C. Hanna, being duly sworn, says that he is the petitioner above named; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the statements contained therein are true except those stated to be upon information and belief, and that those he believes to be true.

BYRON C. HANNA

Subscribed and sworn to before me this 6th day of February, 1943.

[Seal] ELSIE H. MacDONELL

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed T. C. U. S. Feb. 10, 1943. [22]

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

(1) and (2). Admits the allegations contained in paragraphs (1) and (2) of the petition.

(3). Admits the allegations contained in paragraph (3) regarding the deficiencies asserted for the years 1939 and 1940, and understands that no question is now raised in this case regarding the year 1939.

(4). Denies the allegations of error contained in subparagraphs (a) and (b) of paragraph (4) of the petition.

(5). Denies the allegations of fact contained in subparagraphs A. to O., inclusive, of paragraph (5) of the petition, except that the respondent admits the facts stated in the second unnumbered [23] paragraph of subparagraph J. of paragraph (5) of the petition.

(6). Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore it is prayed that the determination of the Commissioner be approved.

(Signed) J. P. WENCHEL ACB

Chief Counsel,

Bureau of Internal Revenue.

Of Counsel:

ALVA C. BAIRD,

Division Counsel.

EARL C. CROUTER,

Speical Attorney,

Bureau of Internal Revenue.

ECC/fmt 4/3/43

[Endorsed]: Filed T. C. U. S. April 8, 1943. [24]

The Tax Court of the United States

Docket Nos. 739, 7400.

BYRON C. HANNA,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DAISY MAY HANNA,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

A. Calder Mackay, Esq., and Adam Y. Bennion,
Esq., for the petitioners.

Earl C. Crouter, Esq., for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION.

Hill, Judge: The Commissioner determined deficiencies of \$4,134.55 and \$3,476.26 in the income taxes of Byron C. Hanna and Daisy May Hanna, respectively, for the calendar year 1940. The sole question presented for our determination is whether respondent erred in denying application of section 107 of the Internal Revenue Code.

FINDINGS OF FACT

Byron C. Hanna and Daisy May Hanna, the petitioners, were husband and wife, residents of Cali-

fornia during 1940 and all other times herein mentioned. They filed individual income tax returns for that year on the community property basis with the collector of internal revenue for the [25] sixth collection district of California. During the taxable year and all other years herein mentioned Byron C. Hanna and Harold C. Morton were law partners known by the firm name of Hanna and Morton.

In July 1932 Etienne Lang, as agent for the members of a Lazard family of France, consulted Hanna and Morton with reference to claims against the Anglo-California National Bank of San Francisco, Herbert Fleishhacker, its president, and others. These claims arose out of certain acts of the Bank and Fleishhacker as agents of the Lazards in the sale some 17 years earlier of lands in California belonging to the Lazards. At that time Lang employed Hanna and Morton to render an opinion on the validity of the claims and to draft a specimen form of complaint. Lang paid Hanna and Morton \$2,500 for these services. There was no obligation on the part of Lang or the Lazards to employ Hanna and Morton for further services and no obligation on the part of Hanna and Morton to accept such employment.

In October 1932, after consulting with other lawyers, Lang employed Hanna and Morton to proceed with the case. Lang and Morton agreed that \$27,500 would be advanced to Hanna and Morton to cover costs and expenses, with the understanding that if any balance should remain at the conclusion of the employment, it would belong to Hanna and Morton.

It was understood that Hanna and Morton received these funds for such purposes only and the accounts of Hanna and Morton dealing with the funds were frequently inspected by Lang. The books of Hanna and Morton designated the fund as a "Trust Account." The \$27,500 was paid over on October 15, 1932, and the receipt given for it read "Lazard Matter, On Account, Trust Acct." It was further agreed that Hanna and Morton would be responsible for any [26] expenses beyond the \$27,500. In addition to any balance remaining of the \$27,500 their fee was to be 15 per cent of the recovery.

For some time \$20,000 of the fund was left on deposit in the firm's name in two savings banks. Lang knew and approved of this. The funds were never kept in a separately designated trust account. Lang knew of this and acquiesced in it.

A total of \$1,168.86 in interest accrued on the savings accounts. During the years 1934 to 1936 Hanna and Morton withdrew this interest for their own unrestricted use having been told by Lang that they could keep it. They were to return it if it ever became necessary to complete the payment of expenses, their obligation in any event being to meet all expenses over the \$27,500. The interest so received was currently reported as income by Hanna and Morton. This interest was a fee for services when it was so withdrawn by Hanna and Morton.

Lang agreed to the withdrawal of \$2,000 by Hanna and Morton as fees at the time the \$27,500 was first paid over in October 1932. Later in the same month an additional \$1,500 was withdrawn as

a fee with Lang's approval. A further fee with-
drawal of \$1,000 was made on May 1, 1933, with
Lang's permission and again on October 31, 1936,
Lang gave Morton his consent for the firm to with-
draw \$1,000. Each of these fees was paid subject
to the understanding that Hanna and Morton were
to make up any deficits for expenses beyond the
original amount paid to them for that purpose.
They included these fees as compensation in their
income tax returns in the years received. [27]

Hanna and Morton successfully tried the case for
the Lazards and on January 19, 1940, the Bank
paid \$746,354.95 in satisfaction of the judgment.
From this amount Hanna and Morton received on
that day \$114,018.19, consisting of the contingent
fee in the amount of \$111,588.84 and \$2,429.35 re-
imbursement of costs expended from the \$27,500
fund. At that time, exclusive of the reimbursement
for costs, there was a balance of \$7,769.55 of the
original \$27,500 which Hanna and Morton also re-
ceived pursuant to the arrangement previously
made. Thus, Hanna and Morton received fees of
\$1,168.86 and \$5,500 prior to completion of the
services in 1940 and \$121,787.74 on completion of
those services in 1940.

Viewing the original payment of \$2,500 as being
for a separate and distinct employment, addition
of these figures indicates that a total fee of \$128,-
456.60 was received by Hanna and Morton on this
case. Of this amount, \$121,787.74, or 94.8 per cent,
was paid on the completion of the services.

OPINION.

The sole issue is whether petitioners are entitled to have their share of a fee for legal services received in 1940 taxed under the provisions of section 107 of the Internal Revenue Code.¹ In order for the section to apply "not less than 95 per centum" of the compensation must be paid only on completion of the services. The Regulations provide that "Section 107 is applicable only where at least 95 per cent of the total compensation for such services is paid on or after their completion."

Treasury Regulations 103, Sec. 19,107-1.

On the completion of their services for the Lazards in 1940 Hanna and Morton received a final fee of \$121,787.74. During the years 1932 through 1936 they received a total of \$6,668.86 in fees on the same case. The fact that Hanna and Morton

1. Section 107, Internal Revenue Code, added by section 220 of the Revenue Act of 1939:

Sec. 107. Compensation for Services Rendered for a Period of Five Years or More.

In the case of compensation (a) received, for personal services rendered by an individual in his individual capacity, or as a member of a partnership, and covering a period of five calendar years or more from the beginning to the completion of such services, (b) paid (or not less than 95 per centum of which is paid) only on completion of such services, [28] and (c) required to be included in gross income of such individual for any taxable year beginning after December 31, 1938, the tax attributable to such compensation shall not be greater than the aggregate of the taxes attributable to such compensation had it been received in equal portions in each of the years included in such period. [29]

were under the contingent liability of meeting any expenses after the exhaustion of the \$27,500 fund paid to them by Lang for expenses did not prevent the payments to them of \$5,500 from the principal of the fund and \$1,168.86 interest on the fund from being fees and income in the years in which received. Cf. *North American Oil Consolidated v. Burnet*, 286 U. S. 417; *Blum v. Helvering*, 74 Fed. (2d) 482, cert. denied 295 U. S. 732; *Highland Milk Condensing Co. v. Phillip*, 34 Fed. (2d) 777, cert. denied 280 U. S. 608.

Since the \$121,787.74 received on completion of the services is 94.8 per cent of \$128,456.60, the entire compensation, the petitioners fail to meet the explicit requirements of section 107.

Enter: Jan. 15, 1945.

Decisions will be entered for the respondent. [30]

The Tax Court of the United States
Washington

Docket No. 739

BYRON C. HANNA,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion entered January 15, 1945, it is

Ordered and Decided: That there is a deficiency in income tax for the calendar year 1940 in the amount of \$4,134.55.

(Signed) SAM B. HILL,
Judge.

Entered Jan. 15, 1945. [31]

United States Circuit Court of Appeals
for the Ninth Circuit

No. 739.

BYRON C. HANNA,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REVIEW OF DECISION OF
THE TAX COURT OF THE UNITED
STATES.

To the Honorable Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:

Comes now Byron C. Hanna, petitioner herein,
and respectfully shows:

NATURE OF THE CONTROVERSY

The Respondent determined a deficiency in the income tax against the Petitioner for the calendar year 1940 in the amount of \$4,134.55.

This deficiency arose from the denial of the application of Section 107 of the Internal Revenue Code to a fee received in the calendar year 1940 by the firm of Hanna and Morton, lawyers, of which firm the petitioner is a partner.

In a companion proceeding the Commissioner also [32] determined a deficiency of \$3,476.26 in the income tax of Daisy May Hanna, wife of petitioner, for the calendar year 1940, arising from the denial to said Daisy May Hanna of the application of Section 107 of the Internal Revenue Code in her return of her community interest in the said fee received during the calendar year 1940.

Petitioner and his said wife, Daisy May Hanna, each filed an appeal to the Tax Court of the United States, which appeals were upon the trial thereof consolidated for trial and opinion.

Thereafter, on January 15, 1945, The Tax Court of the United States rendered its decision in favor of the respondent, and a copy of said decision is attached to this petition. Said decision describes in detail the controversy involved, which, briefly, is as follows:

In October, 1932 Harold C. Morton and petitioner were each attorneys at law, admitted to practice as such in all courts of the State of California and in the United States District Courts in the State of California and in the Circuit Court of Appeals for the Ninth Circuit, and were engaged in the practice of law in the City of Los Angeles, under the firm name and style of Hanna and Morton.

In October, 1932 Hanna and Morton were em-

ployed to prosecute a certain action against the Anglo-California National Bank of San Francisco and Herbert Fleishhacker. [33] At that time they received \$27,500 in trust to be utilized for expenses in said litigation. The litigation was instituted and continued until 1940, during which year it was successfully concluded.

During the period of the pendency of the litigation Hanna and Morton were also employed by the same clients to prosecute other actions and legal proceedings separate and distinct from the specific employment above referred to.

During the period of the pendency of the specific litigation above referred to, Hanna and Morton were permitted by their clients to withdraw from the trust funds various amounts thereof, aggregating \$5,500. Said withdrawals were made with the understanding and upon the agreement that Hanna and Morton would reimburse the trust fund for the amount thereof if required for the payment of costs.

During said period interest accrued in the total amount of \$1,168.86 on the deposit of said trust funds in savings accounts, and Hanna and Morton were permitted by their clients to withdraw this amount with the understanding and upon the promise that it would be returned if necessary for the payment of expenses.

Upon the conclusion of the litigation Hanna and Morton received a fee of \$121,787.74 for their services under said specific employment, plus release of the obligation to return the interest withdrawn

as aforesaid and to reimburse the trust fund for the amounts withdrawn as aforesaid, making [34] a total of \$128,456.60.

The Tax Court of the United States decided that the total fee received by Hanna and Morton in said employment was the latter amount, and that of this amount only \$121,787.74, or 94.8 per cent, was paid on the completion of the services. There was thus decided to be a deficit of one-fifth of one per cent ($\frac{1}{5}$ of 1%) of the amount necessary to be received upon the completion of the services to entitle petitioner to the benefit of the provisions of Section 107 of the Internal Revenue Code.

Petitioner contends that The Tax Court erred in the following particulars:

(a) in finding as a fact or deciding as a matter of law that the withdrawals aforesaid from the trust funds, amounting to \$5,500, constituted payment of a part of the fee for the services rendered in the employment in question to Hanna and Morton when and as received by Hanna and Morton;

(b) in finding as a fact or deciding as a matter of law that the withdrawal of accrued interest on the trust fund, as aforesaid, amounting to \$1,168.86, constituted payment of a part of the fee for the services rendered in the employment in question to Hanna and Morton when and as received by Hanna and Morton; and

(c) in determining that less than 95% of the fee of Hanna and Morton for services under the employment above-mentioned was received in the calendar year 1940. [35]

II.

THE COURT IN WHICH REVIEW IS
SOUGHT

The United States Circuit Court of Appeals for the Ninth Circuit is the Court in which review of said decision of The Tax Court of the United States is sought pursuant to the provisions of Section 1141 of the Internal Revenue Code.

III.

VENUE.

The decision of the United States Tax Court herein was rendered on January 15, 1945. For more than fifty years last past immediately preceding, petitioner has resided in the County of Los Angeles, State of California. He filed his Federal Income Tax returns for the calendar year 1940, and also for all other calendar years since 1916 or thereabouts, with the United States Collector of Internal Revenue for the Sixth Collection District of California, whose office is located at Los Angeles, California and within the Ninth Judicial Circuit of the United States.

The parties hereto have not stipulated that said decision may be reviewed by any Court of Appeals other than the one herein designated. [36]

Wherefore, the Petitioner prays that the decision of The Tax Court of the United States herein be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit; that a transcript of

the record be prepared in accordance with the law and rules of said Court and transmitted to the Clerk of said Court for filing; and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

Dated: April 7, 1945.

A. CALDER MACKAY

ADAM Y. BENNION

Attorneys for Petitioner. [37]

The Tax Court of the United States

Docket Nos. 739, 740.

BYRON C. HANNA,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DAISY MAY HANNA,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

A. Calder Mackay, Esq., and Adam Y. Bennion, Esq., for the petitioners. Earl C. Crouter, Esq., for the respondent.

MEMORANDUM FINDINGS OF FACT AND
OPINION

Hill, Judge: The Commissioner determined deficiencies of \$4,134.55 and \$3,476.26 in the income taxes of Byron C. Hanna and Daisy May Hanna, respectively, for the calendar year 1940. The sole question presented for our determination is whether respondent erred in denying application of section 107 of the Internal Revenue Code.

FINDINGS OF FACT.

Byron C. Hanna and Daisy May Hanna, the petitioners, were husband and wife, residents of California during 1940 and all other times herein mentioned. They filed individual income tax returns for that year on the community property basis with the collector of internal revenue for the sixth collection district of California. During the taxable year and all other years herein mentioned Byron C. Hanna and Harold C. Morton [38] were law partners known by the firm name of Hanna and Morton.

In July 1932 Etienne Lang, as agent for the members of a Lazard family of France, consulted Hanna and Morton with reference to claims against the Anglo-California National Bank of San Francisco, Herbert Fleishhacker, its president, and others. These claims arose out of certain acts of the Bank and Fleishhacker as agents of the Lazards in the sale of some 17 years earlier of lands in California to the Lazards. At that time Lang employed Hanna and Morton to render an opinion on the validity of the claims and to draft a specimen form of com-

plaint. Lang paid Hanna and Morton \$2,500 for these services. There was no obligation on the part of Lang or the Lazards to employ Hanna and Morton for further services and no obligation on the part of Hanna and Morton to accept such employment.

In October 1932, after consulting with other lawyers, Lang employed Hanna and Morton to proceed with the case. Lang and Morton agreed that \$27,500 would be advanced to Hanna and Morton to cover costs and expenses, with the understanding that if any balance should remain at the conclusion of the employment, it would belong to Hanna and Morton. It was understood that Hanna and Morton received these funds for such purposes only and the accounts of Hanna and Morton dealing with the funds were frequently inspected by Lang. The books of Hanna and Morton designated the fund as a "Trust Account." The \$27,500 was paid over on October 15, 1932, and the receipt given [39] for it read "Lazard Matter, On Account, Trust Acct." It was further agreed that Hanna and Morton would be responsible for any expenses beyond the \$27,500. In addition to any balance remaining of the \$27,500 their fee was to be 15 per cent of the recovery.

For some time \$20,000 of the fund was left on deposit in the firm's name in two savings banks. Lang knew and approved of this. The funds were never kept in a separately designated trust account. Lang knew of this and acquiesced in it.

A total of \$1,168.86 in interest accrued on the savings accounts. During the years 1934 to 1936

Hanna and Morton withdrew this interest for their own unrestricted use having been told by Lang that they could keep it. They were to return it if it ever became necessary to complete the payment of expenses, their obligation in any event being to meet all expenses over the \$27,500. The interest so received was currently reported as income by Hanna and Morton. This interest was a fee for services when it was so withdrawn by Hanna and Morton.

Lang agreed to the withdrawal of \$2,000 by Hanna and Morton as fees at the time the \$27,500 was first paid over in October 1932. Later in the same month an additional \$1,500 was withdrawn as a fee with Lang's approval. A further fee withdrawal of \$1,000 was made on May 1, 1933, with Lang's permission and again on October 31, 1936, Lang gave Morton his consent for the firm to withdraw \$1,000. Each of these fees was paid subject to the understanding that Hanna and Morton were to make up any [40] deficits for expenses beyond the original amount paid to them for that purpose. They included these fees as compensation in their income tax returns in the years received.

Hanna and Morton successfully tried the case for the Lazards and on January 19, 1940 the Bank paid \$746,354.95 in satisfaction of the judgment. From this amount Hanna and Morton received on that day \$114,018.19, consisting of the contingent fee in the amount of \$111,588.84 and \$2,429.35 reimbursement of costs expended from the \$27,500 fund. At that time, exclusive of the reimbursement for costs, there was a balance of \$7,769.55 of the original

\$27,500 which Hanna and Morton also received pursuant to the arrangement previously made. Thus, Hanna and Morton received fees of \$1,168.86 and \$5,500 prior to completion of the services in 1940 and \$121,787.74 on completion of those services in 1940.

Viewing the original payment of \$2,500 as being for a separate and distinct employment, addition of these figures indicates that a total fee of \$128,456.60 was received by Hanna and Morton on this case. Of this amount, \$121,787.74, or 94.8 percent, was paid on the completion of the services.

OPINION

The sole issue is whether petitioners are entitled to have their share of a fee for legal services received in 1940 taxed under the provisions of section 107 of the Internal Revenue [41] Code.¹ In

¹Section 107, Internal Revenue Code, added by section 220 of the Revenue Act of 1939:

Sec. 107. Compensation for Services Rendered for a Period of Five Years or More.

In the case of compensation (a) received, for personal services rendered by an individual in his individual capacity, or as a member of a partnership, [42] and covering a period of five calendar years or more from the beginning to the completion of such services, (b) paid (or not less than 95 per centum of which is paid) only on completion of such services, and (c) required to be included in gross income of such individual for any taxable year beginning after December 31, 1938, the tax attributable to such compensation shall not be greater than the aggregate of the taxes attributable to such compensation had it been received in equal portions in each of the years included in such period.

order for the section to apply "not less than 95 per centum" of the compensation must be paid only on completion of the services. The Regulations provide that "Section 107 is applicable only where at least 95 per cent of the total compensation for such services is paid on or after their completion." Treasury Regulations 103, Sec. 19,107-1.

On the completion of their services for the Lazards in 1940 Hanna and Morton received a final fee of \$121,787.74. During the years 1932 through 1936 they received a total of \$6,668.86 in fees on the same case. The fact that Hanna and Morton were under the contingent liability of meeting any expenses after the exhaustion of the \$27,500 fund paid to them by Lang for expenses did not prevent the payments to them of \$5,500 from the principal of the fund and \$1,168.86 interest on the fund from being fees and income in the years in which received. Cf. *North American Oil Consolidated v. Burnet*, 286 U. S. 417; *Blum v. Helvering*, 74 Fed. (2d) 482, cert. denied 295 U. S. 732; *Highland Milk Condensing Co. v. Phillip*, 34 Fed. (2d) 777, cert. denied 280 U. S. 608.

Since the \$121,787.74 received on completion of the services is 94.8 percent of \$128,456.60, the entire compensation, the petitioners fail to meet the explicit requirements of section 107.

Decisions will be entered for the respondent.

(Entered Jan. 15, 1945)

[Endorsed]: Filed T.C.U.S. April 12, 1945

[43]

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF FILING PETITION FOR
REVIEW

To John F. Wenchel, Chief Counsel, Bureau of Internal Revenue, Washington, D. C., Attorney for the Respondent:

Please Take Notice that on the 12th day of April, 1945, the undersigned filed with the Clerk of the Tax Court of the United States the petition of Byron C. Hanna, a copy of which is annexed hereto, for the review by the United States Circuit Court of Appeals for the Ninth Circuit of the final order and decision of the Court heretofore rendered in the above entitled case.

A. CALDER MACKAY

ADAM Y. BENNION

Attorneys for the Petitioner

ADMISSION OF SERVICE

Service of a copy of the above notice and a copy of the petition for review is hereby accepted this 13th day of April, 1945.

J. P. WENCHEL

Chief Counsel, Bureau of Internal Revenue

Attorney for the Respondent.

[Endorsement]: Filed T.C.U.S. April 13, 1945.

[44]

[Title of Tax Court and Cause.]

STIPULATION

Whereas the above-entitled cause involves the same questions as are involved in a companion case before the above-entitled Court, entitled “Daisy May Hanna, Petitioner, vs. Commissioner of Internal Revenue, Respondent, No. 740”, and

Whereas said cause and this cause were consolidated before the above-entitled Court for purposes of trial and decision, and

Whereas the evidence in both of these causes is identical, and

Whereas a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of the above-entitled Court has been filed in said cause No. 740, as well as in this cause, and

Whereas a statement of the evidence has been prepared, served and filed in said cause No. 740 and the evidence in said cause is identical with the evidence in this cause, [45]

Now, Therefore, it is hereby stipulated and agreed that the statement of the evidence in said cause No. 740 is hereby adopted as the statement of the evidence in this cause and with the same force and effect and to all intents and purposes as though a duplicate of said statement of the evidence had been prepared, served and filed in this cause; and that it shall be deemed that the statement of the evidence

prepared, served and filed in said cause No. 740 is a statement of the evidence prepared, served and filed in this cause.

Dated: May 4, 1945.

A. CALDER MACKAY and
ADAM Y. BENNION

A. Calder Mackay

By Adam Y. Bennion

Attorneys for Petitioner

(Signed) J. P. WENCHEL, CAR.

[Endorsed]: Filed T.C.U.S. May 19, 1945. [54]

[Title of Circuit Court of Appeals and Cause.]

PETITIONER'S STATEMENT OF POINTS TO
BE RELIED ON AND DESIGNATION
OF PARTS OF THE RECORD TO BE
PRINTED

Comes now Byron C. Hanna, the petitioner for review in the above-entitled cause, and states that the points on which he intends to rely in this case are as follows:

1. The Tax Court of the United States erred in finding as a fact or deciding as a matter of law that the withdrawals from the \$27,500 trust fund mentioned in the Findings, amounting to \$5,500, constituted payment of a part of the fee for the services rendered in the employment mentioned in the

Finding, to Hanna and Morton when and as received by Hanna and Morton;

2. The Tax Court of the United States erred in finding as a fact or deciding as a matter of law that the withdrawal of accrued interest on the said trust fund, amounting to \$1,168.86, constituted payment of a part of the fee for the services rendered in the said employment to Hanna and Morton when and as received by Hanna and Morton; and

3. The Tax Court of the United States erred [47] in determining that less than 95% of the fee of Hanna and Morton for services under the employment above mentioned was received in the calendar year 1940.

Petitioner hereby designates the entire record, as certified to the Clerk of the above-entitled Court, as necessary to be printed for the consideration of the points set forth above.

A. CALDER MACKAY and
ADAM Y. BENNION

By A. CALDER MARKAY
Attorneys for Petitioner

Service admitted 5/18/45.

(Signed) J. P. WENCHEL, CAR.

[Endorsed]: Filed T.C.U.S. May 19, 1945 [48]

[Title of Circuit Court of Appeals and Cause.]

PETITIONER'S DESIGNATION OF
CONTENTS OF RECORD ON REVIEW

Petitioner hereby designates for inclusion in the record on review in the above-entitled proceeding, the following:

The complete record of all the proceedings and evidence taken before The Tax Court of the United States and all matters required by Subdivision (g) of Rule 75 of the Federal Rules of Civil Procedure; excepting exhibits filed as evidence, but including the stipulation adopting as a statement of evidence in this cause the statement of evidence prepared, served and filed in the cause of Daisy May Hanna, Petitioner vs. Commissioner of Internal Revenue, Respondent, No. 740.

Dated: May 4, 1945.

A. CALDER MACKAY and
ADAM Y. BENNION
A. Calder Mackay

By Adam Y. Bennion
Attorneys for Petitioner.

(Signed) J. P. WENCHEL, CAR.

[Endorsed]: Filed T. C. U. S. May 19, 1945. [49]

[Title of Tax Court.]

CERTIFICATE

I, B. D. Gamble, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 49, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praeceptum in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 4th day of June, 1945.

[Seal]

B. D. GAMBLE

Clerk, The Tax Court of the
United States.

[Endorsed]: No. 11070. United States Circuit Court of Appeals for the Ninth Circuit. Byron C. Hanna, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed June 11, 1945.

PAUL P. O'BRIEN

Clerk of the United States
Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit
No. 739.

BYRON C. HANNA,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ORDER

For cause appearing of record, it is hereby

Ordered: That the time for transmission and delivery of the record on petition for review of the above entitled proceeding in the United States Circuit Court of Appeals for the Ninth Circuit be and it is hereby extended to June 22, 1945.

FRANCIS A. GARRECHT

Judge

Dated May 18, 1945, San Francisco, California

[Endorsed]: Filed May 18, 1945. Paul P. O'Brien, Clerk.

A True Copy. Attest: May 18, 1945.

/s/ PAUL P. O'BRIEN,
Clerk.

Now: June 5, 1945, the foregoing order is certified from the record as a true copy.

[Seal] B. D. GAMBLE
B. D. Gamble
Clerk.

[Endorsed]: T.C.U.S. Filed May 23, 1945.

No. 11071

United States
Circuit Court of Appeals
For the Ninth Circuit.

DAISY MAY HANNA,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the Tax Court
of the United States

FILED

PAUL H. GIBBEN,
CLERK

No. 11071

United States
Circuit Court of Appeals
For the Ninth Circuit.

DAISY MAY HANNA,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the Tax Court
of the United States

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES:

For Taxpayer:

BYRON C. HANNA, Esq.,
A. CALDER MACKAY, Esq.
ADAM Y. BENNION, Esq.

For Comm'r:

EARL C. CROUTER, Esq.

Docket No. 740

DAISY MAY HANNA,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1943

- Feb. 10—Petition received and filed. Taxpayer notified. Fee paid.
- Feb. 11—Copy of petition served on General Counsel.
- Apr. 8—Answer filed by General Counsel.
- Apr. 8—Request for hearing in Los Angeles, California, filed by General Counsel.
- Apr. 14—Notice issued placing proceeding on Los Angeles, California calendar. Service of answer and request made.

1944

- Feb. 29—Hearing set April 24, 1944 in Los Angeles, California.
- Apr. 27, 28—Hearing had before Judge Hill on merits. Motion of counsel for petitioner to consolidate the cases and there being no objection by counsel for respondent. Ordered that the cases be consolidated, 739 & 740. Entry of appearance of A. Calder MacKay Esq., and A. Y. Bennion, Esq., filed at hearing. Briefs due 6/13/44. Replies due 6/28/44. (Simultaneous)
- Jun. 1—Motion for extension to July 1 and July 22, 1944 respectively, to file original and reply brief filed by General Counsel. 6/2/44 Granted.
- Jun. 12—Motion for extension to July 1 and July 22, 1944 respectively, to file original and reply brief filed by taxpayer. 6/13/44 Granted.
- Jun. 19—Transcript of hearing 4/27, 28/44 filed.
- Jun. 23—Motion for extension to July 18, 1944 to file brief filed by taxpayer. 6/26/44 Granted.
- Jul. 1—Brief filed by General Counsel. Served 8/2/44.
- Jul. 12—Motion for extension to Aug. 3, 1944 to file original brief and to Aug. 24, 1944, respectively, to file reply brief, filed by taxpayer. 7/13/44 Granted.

1944

- Aug. 2—Brief filed by taxpayer. 8/2/44 Copy served.
- Aug. 17—Reply brief filed by General Counsel.
- Aug. 24—Reply brief filed by taxpayer. Copy served.

1945

- Jan. 15—Memorandum findings of fact and opinion rendered. Judge Hill. Decision will be entered for respondent. Copies served.
- Jan. 15—Decision entered. Judge Hill. Div. 2. [1*]
- Apr. 12—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, with assignments of error filed by taxpayer.
- Apr. 13—Proof of service filed by taxpayer.
- May 19—Agreed statement of evidence filed.
- May 19—Statement of points to be relied on and designation of parts of the record to be printed filed by taxpayer with proof of service thereon.
- May 19—Designation of contents of record filed by taxpayer with proof of service thereon.
- May 23—Certified copy of order from U. S. Circuit Court of Appeals, 9th Circuit, extending time to 6/22/45 to prepare and deliver the record. [2]

*Page numbering appearing at top of page of original certified Transcript of Record.

The Tax Court of the United States

Docket No. 740

DAISY MAY HANNA,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency LA:IT:90D:PB, dated November 17, 1942; and as a basis of her proceeding alleges as follows:

(1) The petitioner is an individual whose office is located at 1126 Pacific Mutual Building, Los Angeles, California. The return for the period here involved was filed with the Collector for the Sixth District of California.

(2) The Notice of Deficiency (a copy of which is attached and marked "Exhibit A") was mailed to the petitioner on November 17, 1942.

(3) The taxes in controversy are income taxes for the calendar year 1940, in the amount of \$3,476.26. Notice of deficiency discloses a deficiency of \$3,484.95, [3] which includes a deficiency for the calendar year 1939 in the amount of \$8.69, concerning which no question is raised.

(4) The determination of taxes set forth in

the said Notice of Deficiency for the calendar year 1940 is based on the following errors:

(a) The addition and inclusion in petitioner's income for said calendar year of 1940 of the amount of \$28,821.93 as petitioner's share of the community income of petitioner's husband and herself derived from the partnership of Hanna and Morton hereinafter referred to.

(b) The rejection of the application of section 107 of the Internal Revenue Code to a fee received by the partnership of Hanna and Morton in 1940, earned by services extending over a period of eight years.

(5) The facts upon which petitioner relies as the basis of this proceeding are as follows:

A. That at all times herein mentioned:

(a) Byron C. Hanna and petitioner were husband and wife and residents of the State of California. [4]

(b) Byron C. Hanna and Harold C. Morton were equal partners engaged in the practice of law in the City of Los Angeles, State of California under the firm name and style of Hanna and Morton.

B. In July, 1932, Mr. Etienne Lang, representing the Lazard Family, consulted Harold C. Morton, partner of the said Byron C. Hanna, with reference to an important action to be brought on behalf of the members of the Lazard Family.

Thereafter, on August 14, 1932, Mr. Lang paid the firm of Hanna and Morton, of which said Byron C. Hanna is a partner, \$2500.00 for preliminary work, which included the drafting of a complaint

to be submitted to the examination of French counsel.

At that point the service for which the \$2500.00 was paid was complete. There was no obligation on the part of Hanna and Morton to render any further service or to proceed with any action, and no obligation on the part of the clients to employ said firm any further.

C. Thereafter, in October, 1932, Mr. Lang negotiated with Mr. Morton for the employment of Hanna and Morton to conduct said contemplated litigation.

Four different bases of compensation were suggested by Mr. Lang, and the basis of compensation set [5] forth in the contract, a copy of which is annexed hereto and marked "Exhibit B" was selected and accepted by Hanna and Morton.

The contract provides for the immediate payment of \$30,000. The actual amount to be paid was \$27,500. The figure of \$30,000 was inserted at the suggestion of Mr. Lang so as to include and evidence the payment of the \$2,500 previously paid; but said amount of \$2,500 at that time had been entirely earned and paid on August 14, 1932, and represented compensation for an employment separate and distinct from work to be done under the terms of the contract.

D. The sum of \$27,500 was paid to Hanna and Morton on October 15, 1932, upon the execution of the contract.

E. It was known to all parties at that time

(October 15, 1932) that there would be large and substantial costs incurred in connection with the litigation to be prosecuted; and under the terms of the contract, Hanna and Morton assumed the absolute and unconditional obligation to defray the expense of such costs.

By executing the contract and receiving the sum of \$27,500 they also assumed the fiduciary obligation to apply as much of the said sum of \$27,500 as might be required, or all of it if all were required, to the payment of such expenses and costs. [6]

F. At the time of the receipt of said sum of \$27,500 it was not contemplated by the parties that said sum or any part of it would constitute a fee or income to Hanna and Morton except and until all of the expense and costs of such litigation had been paid.

G. The fee for the professional services to be rendered in the litigation was contingent upon success and was to be determined by calculating a percentage of the recovery as set forth in the contract.

H. Consistent with the method of accounting used by Hanna and Morton, the cash payment of \$27,500 was treated in the books of said partnership as a trust fund against which the direct expenses and costs of the litigation was charged. There was also transferred from said trust fund to the partners or to the general account of the partnership the sum of \$5,500, as follows:

October 15, 1932	\$2,000.00
October 31, 1932	1,500.00
May 1, 1933	1,000.00
October 31, 1936	1,000.00
Total	\$5,500.00

These amounts were transferred to partially compensate the partnership for expenses in connection with said employment, including salaries of lawyers employed by the partnership, stenographic help, stationery, etc. incident [7] to the work of said employment and which expenses were paid out of the general funds of the partnership and not charged directly against said trust fund.

1. Consistent with the foregoing the petitioner, in each of the calendar years noted in the preceding paragraph, returned as income the amount received by her by reason of her community interest in the amount transferred to the General Account of the partnership during each such calendar year respectively, as hereinbefore set forth.

Aside from such amounts, petitioner did not include in her income tax returns for the calendar year 1932 or for any year subsequent thereto until 1940, any other portion of said sum of \$27,500, but at all times treated and regarded the said sum, excepting the portions thereof transferred to the General Account of the partnership, as aforesaid, as trust funds which did not constitute income to petitioner.

J. In 1941 petitioner filed an income tax return reporting as income petitioner's community share

in said fee upon the basis provided in section 107 of the Internal Revenue Code.

The Notice of Deficiency disallows this method of returning the said community income of petitioner resulting from said fee, and upon that basis adds to the community income of petitioner for the year 1940 the sum [8] of \$28,821.93 upon which the deficiency for said year is calculated.

It is the addition of this amount of income to petitioner for the calendar year 1940, and the rejection of the application of section 107 of the Internal Revenue Code, which petitioner alleges to be erroneous.

K. The litigation was successfully concluded in 1940, and the contingent fee collected. At that time the unexpended balance in the trust fund amounted to \$7,769.55. This was considered as income earned in that year and was transferred to the general funds of the partnership and added to the contingent fee.

L. The Notice of Deficiency is based upon the assumption that the cash payment of \$27,500 in 1932 was part of the total fee, and that as a result, an amount in excess of five per cent of the total fee was thus received.

The notice, however, ignores the fact that upon that theory the \$27,500 should have been returned as income in 1932, and would be assessable as income in 1932. This is a necessary consequence of the application of the theory upon which the Notice of Deficiency is based.

M. The undersigned alleges that the payment of \$27,500 received in 1932 was accepted subject to an unconditional obligation to pay and defray the expenses of said litigation in an indeterminable amount but nevertheless in [9] an amount which it was then known would be very substantial. No part of said \$27,500 could be treated as income or profit until the complete performance of the obligations of the contract, and therefore the portions thereof, if any, returnable as income, could only be determined at such time.

N. Petitioner alleges that petitioner's part of the income under this contract was received as follows:

1932 Payment	\$ 27,500.00	
Litigation Costs during period		
1932 and 1940	\$ 14,230.45	
Portion taken into Partnership income		
in 1932, 1933 and 1936	\$ 5,500.00	\$ 19,730.45
Determined by Events as Fee in 1940		\$ 7,769.55
Contingent Fee (1940)	\$114,018.19	
Paid to Other Lawyers	6,500.00	107,518.19
Total Fee—1940		<u>\$115,287.74</u>

Petitioner further alleges that the application of section 107 of the Internal Revenue Code is permissible; and if said section is applied, there is no deficiency for the calendar year 1940.

O. Petitioner further alleges that if said section 107 of the Internal Revenue Code is not applicable, then the amount of \$27,500 should be assessed as

income received by the partnership in 1932 and deducted from the total income received by the partnership in 1940; and that the additional tax assessed to [10] Petitioner in the Notice of Deficiency should be accordingly reduced.

Whereupon, the Petitioner prays that this Honorable Court may hear the proceeding and:

(1) Determine that no deficiency exists for the calendar year 1940; or

(2) If it be determined that section 107 of the Internal Revenue Code is not applicable to the fee above referred to, then that the item of \$27,500 received in 1932 shall be treated as partnership income for that year; and that petitioner shall be assessed on her participation in said sum for that year, and that the amount so determined to have been received in 1932 shall be deducted from the amount of said fee charged to petitioner as having been received in 1940, and the deficiency reduced accordingly.

DAISY MAY HANNA

Petitioner.

BYRON C. HANNA

Attorney for Petitioner. [11]

EXHIBIT A

Treasury Department
Internal Revenue Service
Twelfth Floor, U. S. Post Office and Courthouse
Los Angeles, Calif.

Nov. 17, 1942

Office of
Internal Revenue Agent in Charge
Los Angeles Division
LA:IT:90D:PB

Mrs. Daisy May Hanna,
1126 Pacific Mutual Buiding,
Los Angeles, California

Madam:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1939 and December 31, 1940 discloses a deficiency of \$3,484.95 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the The Tax Court of the United States for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf.

The signing and filing of this form will expedite the closing of your returns by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,

Commissioner,

By GEORGE D. MARTIN (Signed)

Internal Revenue Agent in

Charge.

Enclosures:

Statement.

Form of waiver. [12]

Statement

LA:IT:90D:PB

Mrs. Daisy May Hanna,

1126 Pacific Mutual Building,

Los Angeles, California.

Tax Liability for the Taxable Years Ended
December 31, 1939 and 1940

Income Tax

Year	Liability	Assessed	Deficiency
1939	\$ 533.02	\$ 524.33	\$ 8.69
1940	8,582.74	5,106.48	3,476.26
Total	<u>\$9,115.76</u>	<u>\$5,630.81</u>	<u>\$3,484.95</u>

If you do not acquiesce in all of the adjustments making up the deficiency indicated, but desire to

stop the accumulation of interest on that part of the deficiency resulting from adjustments to which you agree, please fill out the enclosed form of waiver, inserting therein the amount of the deficiency you desire to have assessed at once. The execution of the form for the agreed portion of the deficiency will not deprive you of your right to petition The Tax Court of the United States for a redetermination of the deficiency.

A copy of this letter and statement has been mailed to your representative, Mr. Edgar P. Lyons, 639 South Spring Street, Los Angeles, California, in accordance with the authority contained in the power of attorney executed by you.

Adjustment To Net Income
Taxable Year Ended December 31, 1939

Net income as disclosed by return	\$9,816.09
Additional income:	
Partnership income	90.56
<hr/>	
Net income adjusted	\$9,906.65

[13]

Statement.

Explanation Of Adjustment

Your share of the net income from the partnership of Hanna and Morton has been increased in the amount of \$90.56.

Computation Of Tax
Taxable Year Ended December 31, 1939

Net income adjusted	\$9,906.65	
Less: Personal exemption	\$780.15	
Credit for dependent	400.00	1,180.15
		<hr/>
Balance (surtax net income).....	\$8,726.50	
Less: Earned income credit (10% of \$9,906.65).....	990.67	
		<hr/>
Net income subject to normal tax.....	\$7,735.83	
Normal tax at 4% on \$7,735.83.....	\$309.43	
Surtax on \$8,726.50	223.59	
		<hr/>
Total income tax	\$ 533.02	
Correct income tax liability	\$ 533.02	
Income tax assessed:		
Original, account No. 251650	524.33	
		<hr/>
Deficiency of income tax	\$ 8.69	
		[14]

Statement.

Adjustment To Net Income
Taxable Year Ended December 31, 1940

Net income as disclosed by return	\$ 7,389.42
Additional income:	
Partnership income	28,821.93
	<hr/>
Net income adjusted	\$36,211.35

Explanation Of Adjustment

Your share of the net income from the partnership of Hanna and Morton has been increased in the amount of \$28,821.93. Said partnership income is not entitled to be taxed under the provisions of section 107 of the Internal Revenue Code.

Computation Of Alternative Tax
Taxable Year Ended December 31, 1940

Net income adjusted	\$36,211.35
Plus: Net long-term capital loss	2,040.01
<hr/>	
Ordinary net income	\$38,251.36
Less: Personal exemption	979.74
<hr/>	
Balance (surtax net income)	\$37,271.62
Less: Earned income credit	1,400.00
<hr/>	
Net income subject to normal tax	\$35,871.62
Normal tax at 4% on \$35,871.62.....	\$1,434.86
Surtax on \$37,271.62	6979.63
<hr/>	
Partial tax	\$ 8,414.49
Minus: 30% of \$2,040.01 net long-term capital loss.....	612.00
<hr/>	
Alternative tax	\$ 7,802.49
<hr/>	
[15]	

Computation Of Tax
Taxable Year Ended December 31, 1940

Net income adjusted	\$36,211.35
Less: Personal exemption	979.74
<hr/>	
Balance (surtax net income)	\$35,231.61
Less: Earned income credit	1,400.00
<hr/>	
Net income subject to normal tax.....	\$33,831.61
Normal tax at 4% on \$33,831.61.....	\$1,353.26
Surtax on \$35,231.61	6,306.43
<hr/>	
Total normal tax and surtax	\$ 7,659.69
Alternative tax	\$ 7,802.49
Defense tax (10% of \$7,802.49).....	780.25
<hr/>	
Total income tax	\$ 8,582.74
Correct income tax liability	\$ 8,582.74
Income tax assessed:	
Original, account No. 203130	5,106.48
<hr/>	
Deficiency of income tax	\$ 3,476.26
<hr/>	
[16]	

EXHIBIT B

EMPLOYMENT CONTRACT

This Agreement Of Employment made between the undersigned persons, hereafter referred to as the "clients", and Byron Hanna and Harold Morton, co-partners, practicing law under the name of Hanna and Morton, hereafter referred to as the "attorneys", Witnesseth;

Whereas, the clients desire to have the attorneys file the necessary suit (or suits) on behalf of the clients as plaintiffs for an accounting and damages, or other relief, arising out of the sale in 1915 and 1917 of certain parts of Section 24, Township 26 South, Range 20 East, M. D. B. & M., Kern County, California, against the Anglo & London-Paris National Bank, Herbert Fleishhacker, California Star Oil Company, Security Oil Company, and others, as defendants; and

Whereas, the clients and the attorneys desire to enter into an agreement respecting the fees and costs and expenses of such litigation;

Now, Therefore, it is agreed as follows:

Fees And Costs.

The clients will pay to the attorneys the sum of Thirty Thousand Dollars (\$30,000.00) and a contingent fee based on the amount of all sums or things of value recovered as a result of such suit (or suits) of 15% of the first million [17] dollars recovered and 10% of all sums in excess of one million dollars, payable only when and as received by the clients and in the same money or things of

value as are received by the clients. Of said \$30,000.00 the attorneys have heretofore been paid \$2,500.00, and the balance of \$27,500.00 will be paid forthwith upon the execution of this agreement.

The said attorneys agree that in consideration thereof they will bear and pay all expenses and costs of such suit or suits, including all appeals, and hold the clients harmless by reason thereof.

The said attorneys are authorized to do all things appearing to them to be necessary and proper in protecting the rights of the clients with respect to said suit (or suits) and they agree to diligently prosecute the same to their best ability.

Settlement.

Should a settlement of such controversies with the defendants be proposed or considered at any time, the question of whether such settlement should be made will be decided by a majority vote of the several clients and the attorneys, in which vote the attorneys shall have a 15% vote and the clients an 85% vote, the 85% being divided among the [18] clients in accordance with their respective interests in the controversies.

Provided further, that if any settlement be agreed upon, the attorneys shall receive a contingent fee of one-half of the amounts heretofore specified, that is to say, they will receive 7½% of the first million dollars recovered, and 5% thereafter.

1911 Sale.

The attorneys agree that in the prosecution and investigation of the 1915 and 1917 sales referred to,

they will endeavor to gather information as to the facts of a sale in 1911 made by the said Anglo & London-Paris National Bank of property in which the clients were interested. All such information will be placed at the disposal of the clients.

If it appears to the attorneys that a cause of action exists arising out of such 1911 sale, they will forthwith so advise the clients and will prepare the necessary complaint and prosecute a suit for relief by reason of such 1911 sale without further cash payment, upon an entirely contingent fee basis equal to that hereinbefore provided as to such 1915 and 1917 sales.

One or more duplicates of this agreement may be [19] signed. This contract effective only after signature of attorneys at Los Angeles, California.

[20]

State of California,
County of Los Angeles—ss.

Daisy May Hanna, being duly sworn, says that she is the petitioner above named; that she has read the foregoing petition, or had the same read to her, and is familiar with the statements contained therein, and that the statements contained therein are true except those stated to be upon information and belief, and that those she believes to be true.

DAISY MAY HANNA

Subscribed and sworn to before me this 6th day of February, 1943.

[Seal] ELSIE H. MACDONELL
Notary Public in and for the County of Los
Angeles, State of California

[Endorsed]: Filed T. C. U. S. Feb. 10, 1943. [21]

[Title of Tax Court and Cause]

ANSWER

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

(1) and (2). Admits the allegations contained in paragraphs (1) and (2) of the petition.

(3). Admits the allegations contained in paragraph (3) regarding the deficiencies asserted for the years 1939 and 1940, and understands that no question is now raised in this case regarding the year 1939.

(4). Denies the allegations of error contained in subparagraphs (a) and (b) of paragraph (4) of the petition.

(5). Denies the allegations of fact contained in subparagraph A. to O., inclusive, of paragraph (5) of the petition, except that the respondent admits the facts stated in the second [22] unnumbered

paragraph of subparagraph J. of paragraph (5) of the petition.

(6). Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore it is prayed that the determination of the Commissioner be approved.

(Signed) J. P. WENCHEL, ACB
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

ALVA C. BAIRD,
Division Counsel.
EARL C. CROUTER,
Special Attorney, Bureau of
Internal Revenue.

ECC/fat 4/3/43

[Endorsed]: Filed T. C. U. S. April 8, 1943.

[23]

The Tax Court of the United States

Docket Nos. 739. 740

BYRON C. HANNA,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DAISY MAY HANNA,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

A. Calder Mackay, Esq., and Adam Y. Bennion,
Esq., for the petitioners.

Earl C. Crouter, Esq., for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION.

Hill, Judge: The Commissioner determined deficiencies of \$4,134.55 and \$3,476.26 in the income taxes of Byron C. Hanna and Daisy May Hanna, respectively, for the calendar year 1940. The sole question presented for our determination is whether respondent erred in denying application of section 107 of the Internal Revenue Code.

FINDINGS OF FACT.

Byron C. Hanna and Daisy May Hanna, the petitioners, were husband and wife, residents of California during 1940 and all other times herein mentioned. They filed individual income tax returns for that year on the community property basis with the collector of internal revenue for the [24] sixth collection district of California. During the taxable year and all other years herein mentioned Byron C. Hanna and Harold G. Morton were law partners known by the firm name of Hanna and Morton.

In July 1932 Etienne Lang, as agent for the members of a Lazard family of France, consulted Hanna and Morton with reference to claims against the Anglo-California National Bank of San Francisco, Herbert Fleishhacker, its president, and others. These claims arose out of certain acts of the Bank and Fleishhacker as agents of the Lazards in the sale some 17 years earlier of lands in California belonging to the Lazards. At that time Lang employed Hanna and Morton to render an opinion on the validity of the claims and to draft a specimen form of complaint. Lang paid Hanna and Morton \$2,500 for these services. There was no obligation on the part of Lang or the Lazards to employ Hanna and Morton for further services and no obligation on the part of Hanna and Morton to accept such employment.

In October 1932, after consulting with other lawyers, Lang employed Hanna and Morton to proceed with the case. Lang and Morton agreed that

\$27,500 would be advanced to Hanna and Morton to cover costs and expenses, with the understanding that if any balance should remain at the conclusion of the employment, it would belong to Hanna and Morton. It was understood that Hanna and Morton received these funds for such purposes only and the accounts of Hanna and Morton dealing with the funds were frequently inspected by Lang. The books of Hanna and Morton designated the fund as a "Trust Account." The \$27,500 was paid over on October 15, 1932, and the receipt given for it read "Lazard Matter, On Account, Trust Acct." It was further agreed that Hanna and Morton would be responsible for any [25] expenses beyond the \$27,500. In addition to any balance remaining of the \$27,500 their fee was to be 15 per cent of the recovery.

For some time \$20,000 of the fund was left on deposit in the firm's name in two savings banks. Lang knew and approved of this. The funds were never kept in a separately designated trust account. Lang knew of this and acquiesced in it.

A total of \$1,168.86 in interest accrued on the savings accounts. During the years 1934 to 1936 Hanna and Morton withdrew this interest for their own unrestricted use having been told by Lang that they could keep it. They were to return it if it ever became necessary to complete the payment of expenses, their obligation in any event being to meet all expenses over the \$27,500. The interest so received was currently reported as income by Hanna and Morton. This interest was a fee for services

when it was so withdrawn by Hanna and Morton.

Lang agreed to the withdrawal of \$2,000 by Hanna and Morton as fees at the time the \$27,500 was first paid over in October 1932. Later in the same month an additional \$1,500 was withdrawn as a fee with Lang's approval. A further fee withdrawal of \$1,000 was made on May 1, 1933, with Lang's permission and again on October 31, 1936, Lang gave Morton his consent for the firm to withdraw \$1,000. Each of these fees was paid subject to the understanding that Hanna and Morton were to make up any deficits for expenses beyond the original amount paid to them for that purpose. They included these fees as compensation in their income tax returns in the years received.[26]

Hanna and Morton successfully tried the case for the Lazards and on January 19, 1940, the Bank paid \$746,354.95 in satisfaction of the judgment.

From this amount Hanna and Morton received on that day \$114,018.19, consisting of the contingent fee in the amount of \$111,588.84 and \$2,429.35 reimbursement of costs expended from the \$27,500 fund. At that time, exclusive of the reimbursement for costs, there was a balance of \$7,769.55 of the original \$27,500 which Hanna and Morton also received pursuant to the arrangement previously made. Thus, Hanna and Morton received fees of \$1,168.86 and \$5,500 prior to completion of the services in 1940 and \$121,787.74 on completion of these services in 1940.

Viewing the original payment of \$2,500 as being for a separate and distinct employment, addition

of these figures indicates that a total fee of \$128,456.60 was received by Hanna and Morton on this case. Of this amount, \$121,787.74, or 94.8 per cent, was paid on the completion of the services.

OPINION.

The sole issue is whether petitioners are entitled to have their share of a fee for legal services received in 1940 taxed under the provisions of section 107 of the Internal Revenue Code.¹ In order for the section to apply "not less than 95 per centum" of the compensation must be paid only on completion of the services. The Regulations provide that "Section 107 is applicable only where at least 95 per cent of the total compensation for such services is paid on or after their completion."

1. Section 107, Internal Revenue Code, added by section 220 of the Revenue Act of 1939:

Sec. 107. Compensation for Services Rendered for a Period of Five Years or More.

In the case of compensation (a) received, for personal services rendered by an individual in his individual capacity, or as a member of a partnership, and covering a period of five calendar years or more from the beginning to the completion of such services, (b) paid (or not less than 95 per centum of which is paid) only on completion of such services, [27] and (c) required to be included in gross income of such individual for any taxable year beginning after December 31, 1938, the tax attributable to such compensation shall not be greater than the aggregate of the taxes attributable to such compensation had it been received in equal portions in each of the years included in such period. [28]

Treasury Regulations 103, Sec. 19,107-1.

On the completion of their services for the Lazards in 1940 Hanna and Morton received a final fee of \$121,787.74. During the years 1932 through 1936 they received a total of \$6,668.86 in fees on the same case. The fact that Hanna and Morton were under the contingent liability of meeting any expenses after the exhaustion of the \$27,500 fund paid to them by Lang for expenses did not prevent the payments to them of \$5,500 from the principal of the fund and \$1,168.86 interest on the fund from being fees and income in the years in which received. Cf. *North American Oil Consolidated v. Burnet*, 286 U. S. 417; *Blum v. Helvering*, 74 Fed. (2d) 482, cert. denied 295 U. S. 732; *Highland Milk Condensing Co. v. Phillip*, 34 Fed. (2d) 777, cert. denied 280 U. S. 608.

Since the \$121,787.74 received on completion of the services is 94.8 per cent of \$128,456.60, the entire compensation, the petitioners fail to meet the explicit requirements of section 107.

Enter: Jan. 15, 1945.

Decisions will be entered for the respondent. [29]

The Tax Court of the United States
Washington

Docket No. 740

DAISY MAY HANNA,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion entered January 15, 1945, it is

Ordered and Decided: That there is a deficiency in income tax for the calendar year 1940 in the amount of \$3,476.26.

/s/ SAMUEL B. HILL,
Judge.

Entered Jan. 15, 1945.

Copies Served on Both Parties. [30]

United States Circuit Court of Appeals
for the Ninth Circuit

No. 740

DAISY MAY HANNA,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REVIEW OF DECISION OF
THE TAX COURT OF THE UNITED
STATES

To the Honorable Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:
Comes now Daisy May Hanna, petitioner
herein, and respectfully shows:

I.

NATURE OF THE CONTROVERSY

The Respondent determined a deficiency in the income tax against the Petitioner for the calendar year 1940 in the amount of \$3,476.26.

This deficiency arose from the denial of the application of Section 107 of the Internal Revenue Code to petitioners' community interest in a fee received in the calendar year 1940 by the firm of Hanna and Morton, lawyers, of which firm the petitioner's husband, Byron C. Hanna, is a partner.

In a companion proceeding the Commissioner also [31] determined a deficiency of \$4,134.55 in the income tax of Byron C. Hanna, husband of peti-

tioner, for the calendar year 1940, arising from the denial to said Byron C. Hanna of the application of Section 107 of the Internal Revenue Code in his return of his community interest in the said fee received during the calendar year 1940.

Petitioner and her said husband, Byron C. Hanna, each filed an appeal to The Tax Court of the United States, which appeals were upon the trial thereof consolidated for trial and opinion.

Thereafter, on January 15, 1945, The Tax Court of the United States rendered its decision in favor of the respondent, and a copy of said decision is attached to this petition. Said decision describes in detail the controversy involved, which briefly, is as follows:

In October, 1932 Harold C. Morton and Byron C. Hanna were each attorneys at law, admitted to practice as such in all courts of the State of California and in the United States District Courts in the State of California and in the Circuit Court of Appeals for the Ninth Circuit, and were engaged in the practice of law in the City of Los Angeles, under the firm name and style of Hanna and Morton.

In October, 1932 Hanna and Morton were employed to prosecute a certain action against the Anglo-California National Bank of San Francisco and Herbert Fleishhacker. [32] At that time they received \$27,500 in trust to be utilized for expenses in said litigation. The litigation was instituted and continued until 1940, during which year it was successfully concluded.

During the period of the pendency of the litigation Hanna and Morton were also employed by the same clients to prosecute other actions and legal proceedings separate and distinct from the specific employment above referred to.

During the period of the pendency of the specific litigation above referred to, Hanna and Morton were permitted by their clients to withdraw from the trust funds various amounts thereof, aggregating \$5,500. Said withdrawals were made with the understanding and upon the agreement that Hanna and Morton would reimburse the trust fund for the amount thereof if required for the payment of costs.

During said period interest accrued in the total amount of \$1,168.86 on the deposit of said trust funds in savings accounts, and Hanna and Morton were permitted by their clients to withdraw this amount with the understanding and upon the promise that it would be returned if necessary for the payment of expenses.

Upon the conclusion of the litigation Hanna and Morton received a fee of \$121,787.74 for their services under said specific employment, plus release of the obligation to return the interest withdrawn as aforesaid and to reimburse the trust fund for the amounts withdrawn as aforesaid, making [33] a total of \$128,456.60.

The Tax Court of the United States decided that the total fee received by Hanna and Morton in said employment was the latter amount, and that of this amount only \$121,787.74, or 94.8 per cent, was paid

on the completion of the services. There was thus decided to be a deficit of one-fifth of one per cent ($1/5$ of 1%) of the amount necessary to be received upon the completion of the services to entitle petitioner to the benefit of the provisions of Section 107 of the Internal Revenue Code.

Petitioner contends that The Tax Court erred in the following particulars:

(a) in finding as a fact or deciding as a matter of law that the withdrawals aforesaid from the trust funds, amounting to \$5,500, constituted payment of a part of the fee for the services rendered in the employment in question to Hanna and Morton when and as received by Hanna and Morton;

(b) in finding as a fact or deciding as a matter of law that the withdrawal of accrued interest on the trust fund, as aforesaid, amounting to \$1,168.86, constituted payment of a part of the fee for the services rendered in the employment in question to Hanna and Morton when and as received by Hanna and Morton; and

(c) in determining that less than 95% of the fee of Hanna and Morton for services under the employment [34] above-mentioned was received in the calendar year 1940.

II.

THE COURT IN WHICH REVIEW IS SOUGHT

The United States Circuit Court of Appeals for the Ninth Circuit is the Court in which review of

said decision of The Tax Court of the United States is sought pursuant to the provisions of Section 1141 of the Internal Revenue Code.

III.

VENUE

The decision of the United States Tax Court herein was rendered on January 15, 1945. For more than thirty years last past immediately preceding, petitioner has resided in the County of Los Angeles, State of California. She filed her Federal Income Tax returns for the calendar year 1940, and also for all other calendar years since 1916 or thereabouts, with the United States Collector of Internal Revenue for the Sixth Collection District of California, whose office is located at Los Angeles, California and within the Ninth Judicial Circuit of the United States.

The parties hereto have not stipulated that said decision may be reviewed by any Court of Appeals other than the one herein designated. [35]

Wherefore, the Petitioner prays that the decision of The Tax Court of the United States herein be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit: that a transcript of the record be prepared in accordance with the law and rules of said Court and transmitted to the Clerk of said Court for filing; and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

Dated: April 7, 1945.

A. CALDER MACKAY

ADAM Y. BENNION

Attorneys for Petitioner.

[Endorsed]: Filed T. C. U. S. April 12, 1945.

[36]

The Tax Court of the United States

Docket Nos. 739, 740.

BYRON C. HANNA,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DAISY MAY HANNA,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

A. Calder Mackay, Esq., and Adam Y. Bennion, Esq., for the petitioners. Earl C. Crouter, Esq., for the respondent.

MEMORANDUM FINDINGS OF FACT AND
OPINION

Hill, Judge: The Commissioner determined deficiencies of \$4,134.55 and \$3,476.26 in the income

taxes of Byron C. Hanna and Daisy May Hanna, respectively, for the calendar year 1940. The sole question presented for our determination is whether respondent erred in denying application of section 107 of the Internal Revenue Code.

FINDINGS OF FACT.

Byron C. Hanna and Daisy May Hanna, the petitioners, were husband and wife, residents of California during 1940 and all other times herein mentioned. They filed individual income tax returns for that year on the community property basis with the collector of internal revenue for the sixth collection district of California. During the taxable year and all other years herein mentioned Byron C. Hanna and Harold C. Morton [37] were law partners known by the firm name of Hanna and Morton.

In July 1932 Etienne Lang, as agent for the members of a Lazard family of France, consulted Hanna and Morton with reference to claims against the Anglo-California National Bank of San Francisco, Herbert Fleishhacker, its president, and others. These claims arose out of certain acts of the Bank and Fleishhacker as agents of the Lazards in the sale some 17 years earlier of lands in California belonging to the Lazards. At that time Lang employed Hanna and Morton to render an opinion on the validity of the claims and to draft a specimen form of complaint. Lang paid Hanna and Morton

\$2,500 for these services. There was no obligation on the part of Lang or the Lazards to employ Hanna and Morton for further services and no obligation on the part of Hanna and Morton to accept such employment.

In October 1932, after consulting with other lawyers, Lang employed Hanna and Morton to proceed with the case. Lang and Morton agreed that \$27,500 would be advanced to Hanna and Morton to cover costs and expenses, with the understanding that if any balance should remain at the conclusion of the employment, it would belong to Hanna and Morton. It was understood that Hanna and Morton received these funds for such purposes only and the accounts of Hanna and Morton dealing with the funds were frequently inspected by Lang. The books of Hanna and Morton designated the fund as a "Trust Account." The \$27,500 was paid over on October 15, 1932, and the receipt given [38] for it read "Lazard Matter, on Account, Trust Acct." It was further agreed that Hanna and Morton would be responsible for any expenses beyond the \$27,500. In addition to any balance remaining of the \$27,500 their fee was to be 15 per cent of the recovery.

For some time \$20,000 of the fund was left on deposit in the firm's name in two savings banks. Lang knew and approved of this. The funds were never kept in a separately designated trust account. Lang knew of this and acquiesced in it.

A total of \$1,168.86 in interest accrued on the savings accounts. During the years 1934 to 1936 Hanna and Morton withdrew this interest for their

own unrestricted use having been told by Lang that they could keep it. They were to return it if it ever became necessary to complete the payment of expenses, their obligation in any event being to meet all expenses over the \$27,500. The interest so received was currently reported as income by Hanna and Morton. This interest was a fee for services when it was so withdrawn by Hanna and Morton.

Lang agreed to the withdrawal of \$2,000 by Hanna and Morton as fees at the time the \$27,500 was first paid over in October 1932. Later in the same month an additional \$1,500 was withdrawn as a fee with Lang's approval. A further fee withdrawal of \$1,000 was made on May 1, 1933, with Lang's permission and again on October 31, 1936, Lang gave Morton his consent for the firm to withdraw \$1,000. Each of these fees were paid subject to the understanding that Hanna and Morton were to make up any [39] deficits for expenses beyond the original amount paid to them for that purpose. They included these fees as compensation in their income tax returns in the years received.

Hanna and Morton successfully tried the case for the Lazards and on January 19, 1940 the Bank paid \$746,354.95 in satisfaction of the judgment. From this amount Hanna and Morton received on that day \$114,018.19, consisting of the contingent fee in the amount of \$111,588.84 and \$2,429.35 reimbursement of costs expended from the \$27,500 fund. At that time, exclusive of the reimbursement for costs, there was a balance of \$7,769.55 of the original

\$27,500 which Hanna and Morton also received pursuant to the arrangements previously made. Thus, Hanan and Morton received fees of \$1,168.86 and \$5,500 prior to completion of the services in 1940 and \$121,787.74 on completion of those services in 1940.

Viewing the original payemnt of \$2,500 as being for a separate and distinct employment, addition of these figures indicates that a total fee of \$128,456.60 was received by Hanna and Morton on this case. Of this amount, \$121,787.74, or 94.8 per cent, was paid on the completion of the services.

OPINION

The sole issue is whether petitioners are entitled to have their share of a fee for legal services received in 1940 taxed under the provisions of section 107 of the Internal Revenue [40] Code.¹ In order

1. Section 107, Internal Revenue Code, added by section 220 of the Revenue Act of 1939;

Sec. 107. Compensation for Services Rendered for a Period of Five Years or More.

In the case of compensation (a) received, for personal services rendered by an individual in his individual capacity, or as a member of a partnership, [41] and covering a period of five calendar years or more from the beginning to the completion of such services, (b) paid (or not less than 95 per centum of which is paid) only on completion of such services, and (c) required to be included in gross income of such individual for any taxable year beginning after December 31, 1938, the tax attributable to such compensation shall not be greater than the aggregate of the taxes attributable to such compensation had it been received in equal portions in each of the years included in such period.

for the section to apply "not less than 95 per centum" of the compensation must be paid only on completion of the services. The Regulations provide that "Section 107 is applicable only where at least 95 per cent of the total compensation for such services is paid on or after their completion." Treasury Regulations 103, Sec. 19,107-1.

On the completion of their services for the Lazards in 1940 Hanna and Morton received a final fee of \$121,787.74. During the years 1932 through 1936 they received a total of \$6,668.86 in fees on the same case. The fact that Hanna and Morton were under the contingent liability of meeting any expenses after the exhaustion of the \$27,500 fund paid to them by Lang for expenses did not prevent the payments to them of \$5,500 from the principal of the fund and \$1,168.86 interest on the fund from being fees and income in the years in which received. Cf. *North American Oil Consolidated v. Burnet*, 286 U. S. 417; *Blum v. Helvering*, 74 Fed. (2d) 482, cert. denied 295 U. S. 732; *Highland Milk Condensing Co. v. Phillip*, 34 Fed. (2d) 777, cert. denied 280 U. S. 608.

Since the \$121,787.74 received on completion of the services is 94.8 per cent of \$128,456.60, the entire compensation, the petitioners fail to meet the explicit requirements of section 107.

Decisions will be entered for the respondent.

Entered Jan. 15, 1945.

[Endorsed]: Filed T. C. U. S. April 12, 1945.
[42]

United States Circuit Court of Appeals
for the Ninth Circuit

T. C. No. 740

DAISY MAY HANNA,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

NOTICE OF FILING PETITION
FOR REVIEW

To John P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Washington, D. C., Attorney for the Respondent:

Please Take Notice that on the 12th day of April, 1945, the undersigned filed with the Clerk of the Tax Court of the United States the petition of Daisy May Hanna, a copy of which is annexed hereto, for the review by the United States Circuit Court of Appeals for the Ninth Circuit of the final order and decision of the Court heretofore rendered in the above entitled case. Dated this 13th day of April, 1945.

A. CALDER MACKAY
ADAM Y. BENNION

Attorneys for the Petitioner

ADMISSION OF SERVICE

Service of a copy of the above notice and a copy of the petition for review is hereby accepted this 13th day of April, 1945.

J. P. WENCHEL C. A. R.

Chief Counsel Bureau of Internal Revenue

Attorney for the Respondent.

[Endorsed]: Filed T.C.U.S., April 13, 1945. [43]

The Tax Court of the United States

No. 740

DAISY MAE HANNA,

Petitioner,

v.

COMMISSIONER OF INTERNAL REPENUE,
Respondent.

STATEMENT OF EVIDENCE

Following is a statement of evidence in narrative form in the above entitled cause.

This cause came on for hearing before Honorable Sam B. Hill, Judge of the Tax Court of the United States, on April 27 and 28, 1944. Messrs. A. Calder Mackay, Adam Y. Bennion, and Arthur McGregor appeared on behalf of Petitioner, and Earl C. Crouter, Esq. appeared on behalf of the Respondent.

Before any witness was called to testify, this cause was ordered consolidated for trial and opinion with a companion case before The Tax Court of the United States, entitled, "Byron C. Hanna, Petitioner, v. Commissioner of Internal Revenue, Respondent," Number 739.

Whereupon,

HAROLD C. MORTON

was called as a witness by and on behalf [44] of the Petitioners; and having been first duly sworn, was examined, and testified as follows:

Direct Examination

My name is Harold C. Morton. I have been for almost twenty-eight years and am now a practicing lawyer. Since about June 1932 I have been a partner of Byron C. Hanna under the firm name of Hanna and Morton.

I have been acquainted with Mr. Etienne Lang since July of 1932. He consulted me at that time with regard to claims that the members of his family, the Lazard family of France, might have against Herbert Fleishhacker, the Anglo-California Bank of San Francisco, and certain other persons who had purchased properties from the Lazard family in 1915 and 1917.

He consulted me at that time about the validity of the claim, and specifically employed us to advise him as to our views, and to draft the kind of a complaint that would be filed in such case in order that he might send it to a Mr. LePauille, an attorney in France who represented the family.

(Testimony of Harold C. Morton.)

Mr. Lang was very explicit, that his employment of us at that time was wholly for the purpose of giving advice and drafting this complaint, and we agreed upon a fee of \$2,500 to cover that specific work. We were paid \$2,500. Our records will show the exact date. [45] That particular work was done and submitted to him; that is, I gave him my opinion as to where they stood in the matter and did draft a complaint which I delivered to him and which he took with him.

The office gave him a receipt on the stationery bearing the name Fredericks, Hanna and Morton. This was the name of our firm prior to June, 1932.

A photostatic copy of the receipt was identified by the witness and admitted in evidence as Petitioner's Exhibit 1. It reads, so far as material:

"No. 10786

Los Angeles, California

August 19, 1932.

"Received of Lazard matter the sum of \$2,500 on account.

Fredericks, Hanna and Morton

By H.C.M."

I did not see Mr. Lang from the time I delivered the draft of the complaint to him, which would be sometime in August, until the month of October. When I delivered the complaint to Mr. Lang he informed me that no definite decision had been made whether to file suit or to employ our firm.

He returned in October and said that he finally

(Testimony of Harold C. Morton.)

had decided to file suit and that in the meantime he had made investigations of our firm which had been quite [46] complimentary and he had been authorized by his family to employ us to bring the suit which had been discussed.

At that time (in October) and after discussions back and forth of various plans on which we might handle the employment, I told him we would handle it for a fee of fifteen percent of the recovery, provided they would put up the estimated costs and expenses of the litigation, which I expected and we discussed would be very heavy in view of the personalities involved, the ancient history involved, because we were talking then in 1932 about a transaction which had occurred in 1915, and the influence of the people against whom the proceeding would be brought.

We discussed that back and forth and finally agreed upon the figure that they would put up of \$27,500. Mr. Lang, who is a very precise little Frenchman, was quite insistent that the money be handled in such a manner that it would be used to defray the expenses, with the understanding that at the end of the road, if there was anything left over, it would be ours, which I agreed to.

I explained to him that we received clients' moneys from time to time for expenses of litigation, and while we put them in general accounts, we always carry them on our records as trust funds; that we would do the same with this amount and that he would have access to that record at all times.

(Testimony of Harold C. Morton.)

We agreed upon the matter, and at his request thereafter on frequent occasions he did have access to the records [47] which were thereafter maintained.

I know it was in the month of October of that year that we received the \$27,500. You have produced a receipt which is dated October 15, 1932 for \$27,500, which says, "Lazard matter, on account, Trust Account," and I of course from that fixed the date as October 15th and that we received the money, so these conversations and negotiations which I had with Mr. Lang upon his return and the time he said they were going to definitely employ us were prior to October 15th. I remember getting the check in San Francisco and I know I went to San Francisco with Mr. Lang after we had orally agreed upon the matter and so on in October.

A photostatic copy of the receipt for \$27,500 was received in evidence as Petitioner's Exhibit 2. This exhibit reads, so far as material:

"No. 10797

Los Angeles, Cal.

October 15, 1932.

"Received of Lazard matter the sum of
\$27,500.00 on account trust acct.

Fredericks, Hanna and Morton

By H.C.M."

Our system of records at the time we are talking about consisted of when money was received a receipt being given therefor, such as the previous two

(Testimony of Harold C. Morton.)

exhibits [48] you have hereinbefore introduced; a daily financial report rendered to Mr. Hanna and to me which would show all moneys on hand and all trust accounts at that time, and the banks the moneys were in usually, although sometimes the bank accounts were lumped together, and a statement of the previous day's receipts and the previous days expenditures itemized. As far as clients' cards were concerned we maintained a sort of loose-leaf card system with the name of the client or the matter on, on which moneys which came in would be entered and money which went out which was chargeable against would be entered.

We also maintained a trust account. At all times we wanted to know how much money in the account was ours and how much was others. You will always find shown on our daily statements how much the trusts were and then the net balance showing what the firm of Hanna and Morton had.

The document you show me is a photostat of the original of our daily financial report of August 19, 1932, which is one incidentally which says, Receipt No. 10785, which I believe is the receipt you marked Exhibit 1 ("H.C.M.") which refers to Harold C. Morton, "Received from Lazard matter the amount of \$2,500.00."

A photostatic copy of the daily financial report of Augsut 19, 1932 was received in evidence as [49] Petitioner's Exhibit 3. In so far as material, it shows total funds on hand in the amount of \$2,716.61; trust fund, \$566.30; net balance, \$2,150.31.

(Testimony of Harold C. Morton.)

Under the title, "Funds received" it shows the following entry:

"Receipt No.	By Whom	From Whom	Trust	Amount
10786	H.C.M.	Lazard Matter,		\$2500.00"

Under the title, "Funds expended" the following entries appear:

"Check No.	To Whom	Charged to Whom	Amount
348	H. C. Morton	Expense,	\$1000.00
349	Byron C. Hanna,	Expense,	1000.00"

The statement also contains other items under the title, "Funds expended", the total of all items under that title being \$2,252.22.

These are photostatic copies of our daily financial reports for October 14, 15 and 17 of 1932. The October 14th one is the day before we received the \$27,500 and it shows certain moneys and on that occasion showed the trust fund amounted to \$543.04. The next one, October 15th, 1932, shows the receipt by Receipt No. 10,797, which I think was your Exhibit 2 here, "By Harold C. Morton, the Lazard matter" with the heading, "Trust \$27,500.00". The October 17th one is the one after, undoubtedly the 15th was a Saturday, from the order in which you have produced these, and shows a trust fund at that time of \$26,000.00 and some odd dollars.

These three photostatic copies of the daily [50] financial reports were received in evidence as Petitioner's Exhibit No. 4. The report of October 14th, 1932 shows total funds on hand, \$1,476.25; trust fund, \$543.04; net balance, \$933.21. The report of October 15, 1932 shows total funds on hand in

(Testimony of Harold C. Morton.)

the amount of \$26,174.05; Trust fund, \$26,043.04; net balance, \$131.01. Under the title, "Funds received" the following entry appears:

"Receipt No.	By Whom	From Whom	Trust	Amount
10797	H.C.M.	Lazard Matter, Trust,		\$27,500.00"

Under the title, "Funds expended" the following entries appear:

"Check No.	To Whom	Charged to Whom	Amount
365	Byran C. Hanna,	Lazard Trust,	\$ 1,000.00
366	Harold C. Morton,	Lazard Trust,	1,000.00
640	Bank of America		
		To Savings Account, Tr	10,000.00
641	Security First Nt.		
		To Savings Account, Tr	10,000.00

There are other entries of funds expended and the total funds expended were \$22,802.00. The report of October 17, 1932 shows total funds on hand in the amount of \$26,078.34; Trust Fund, \$26,043.04; net balance, \$35.30. Other entries of funds received and expended are immaterial to the present case.

This is one of our loose-leaf sheets which we carry for each client or matter. It is headed, "Fredericks & Hanna" being still an older firm than Fredericks, Hanna and Morton, but the stationery had been carried over and used. It is marked "Lazard Matter" and has the heading "Trust Account". [51] The first entry is August, on account, the word, "retainer" written in by an apparently different type-writer, of "\$2,500.00" a debit and a credit. Then balanced out. I might explain the trust account was not out there until a subsequent date; when the matter was set up the \$27,500 was set up on the

(Testimony of Harold C. Morton.)

card. That was on October 15th, when it was received. I can explain the three items on this ledger card of \$1,000, \$1,000, and \$1,500.

When we discussed the \$27,500 I discussed with Mr. Lang the matter of Mr. Hanna and I each withdrawing some of that money because we would be expending time and expenses which would not appear on the card as such and told him we would like to draw \$5,000. He discussed that with me and we agreed that instead we would at that time each take \$1,000 from this trust account, and in the latter part of the month we agreed to another \$1,500 with the understanding between Mr. Lang and myself that were it necessary, of course those moneys would be restored and we would complete the payment of all expenses which might be incurred.

The ledger card was received in evidence as Petitioner's Exhibit No. 5. It bears the number 852 A. The name, "Lazard Matter" and the title, "Trust Account." Under date of August 19, 1932 appears the entry, "On account, retainer 10786" and under the heading, "Charges" \$2,500.00: and under the heading "Credits" \$2,500.00: and under the heading, "Balance" nothing. [52]

Under date of October 15, 1932 there is an entry entitled "Byron C. Hanna, Tr Retainer 395 \$1,000" inserted under the heading entitled "Charges." A similar entry for a similar amount immediately follows with the name "Harold C. Morton" in place of Byron C. Hanna. The account also contains an entry on October 15, 1932 reading, "On account

(Testimony of Harold C. Morton.)

Trust, 10797" and under the heading "Credits" \$27,500.00. There is also an entry under date of October 31, 1932 entitled "To Attorneys fees, Trust Acct," and under the heading "Charges" \$1,500.

Ledger Card No. 852 B is the same account at a subsequent period. Referring to a withdrawal, "H & M from Lazard, \$1,000" dated May 1, 1933, we drew the following year that amount under like circumstances as I have described with respect to the withdrawals in the first month in which we had the trust fund.

This ledger card was received in evidence as Petitioner's Exhibit 6. It bears the number 852 B, the name, "Lazard Matter", the designation, "Trust Account". It contains an entry under date of May 1, 1933 reading "Withdraw. H & M from Lazard," and under the column designated "Charges", "\$1,000.00."

Referring to the card headed "Hanna and Morton" "1328" we finally used up all the old stationery. That is just a continuation of that account only for 1936. Referring to an item dated October 31, 1936 of \$1,000.00, that [53] was handled under like circumstances. Wherever those withdrawals occurred they were discussed with Mr. Lang, who represented the Lazard family.

This card was received in evidence as Petitioner's Exhibit 7. It is numbered 1328 B, bears the name "Lazard Trust" and the designation, in parenthesis, "General a/c—Fleishhacker." It contains an entry

(Testimony of Harold C. Morton.)

under date of October 31, 1936, reading, "Trans. from Trust—fee", and under the heading, "Charges," "1,000.00."

The card No. 784 which is headed "Trust Department" is the card the bookkeeper keeps to keep track of how much money we have of all clients in trust, and you will find the names of various clients and amounts in and out, together with a running balance of the trust amounts we hold for clients, which amounts conform or should conform with the amount shown on our daily financial sheet which Mr. Hanna and I receive each day. The item of October 15, \$27,500, is the same item to which I testified we agreed to and did put in trust in October in connection with these Lazard matters.

With reference to the item, "B.C.H. and H.C.M. Salary, Lazard \$2,000", I don't know why the word "salary" would be there, but the \$2,000 was the \$2,000 we withdrew at that time under the circumstances I related a moment ago.

This ledger card was received in evidence as Petitioner's Exhibit No. 8. It bears the number 784 and the [54] designation. "Trust Department." It contains an entry under date of October 15, 1932, entitled, "Lazard Matter 10953" and in the column under the designation, "Credits", \$27,500. The next entry is also dated October 15, 1932, and bears the designation, "B.C.H. and H.C.M. Salary, Lazard 395-6", and in the column under the designation, "Charges" appears the figure 2,000.00. It also contains an entry under date of October 31, 1932, read-

(Testimony of Harold C. Morton.)

ing, "Chg. Lazard Matter Attys fees" and opposite that in the column under the designation, "Charges", the figures 1500.00.

Card No. 883, entitled "Trust Account" is a continuation of the same account. The item of May 1, 1933, entitled, "Withdrawal H & M from Lazard, \$1,000.00" is the same item which I identified as of the same date a few moments ago, withdrawn after discussion and approval from Mr. Lang.

This ledger card was received in evidence as Petitioner's Exhibit No. 9. It bears the number 883 and the designation, "Trust Account." Under the date May 1, 1933 appears an entry entitled, "Withdrawal H & M from Lazard", and in the column under the heading "Charges" appears the entry of \$1,000.

Referring to Exhibit 8, the item of October 31, 1932 of \$1,500 charged Lazard matter attorneys fees is the item we took at the end of October that I testified to previously. That is, October of 1932, with Mr. Lang's [55] approval.

In October 1932 I submitted a contract to Mr. Lang and he initialled it. He was the agent and had power of attorney from these various people in France, but it was desired to have the contract sent to France and there signed, if possible, by as many of the parties of interest themselves. So, at that time a contract was drawn which Mr. Lang initialled and okayed and then copies of that were sent to France, and I think many, many months later we received the one back with various signa-

(Testimony of Harold C. Morton.)

tures on it. This document is a photostat of the form of contract which I drew at the time and which Mr. Lang marked "O.K. Etienne Lang", and I signed, "Hanna and Morton by Harold Morton."

This photostatic copy of the employment agreement was received in evidence as Petitioner's Exhibit No. 10. An exact copy of Petitioner's Exhibit No. 10, omitting date and signatures, is attached to the petition filed herein by Petitioner with The Tax Court of the United States as Exhibit B. The provisions of that agreement with reference to the payment of fees and costs are as follows:

"FEES AND COSTS.

The clients will pay to the attorneys the sum of Thirty Thousand Dollars (\$30,000.00) and a contingent fee based on the amount of all sums [56] or things of value recovered as a result of such suit (or suits) of 15% of the first million dollars recovered and 10% of all sums in excess of one million dollars, payable only when and as received by the clients and in the same money or things of value as are received by the clients. Of said \$30,000.00 the attorneys have heretofore been paid \$2,500.00, and the balance of \$27,500.00 will be paid forthwith upon the execution of this agreement.

The said attorneys agree that in consideration thereof they will bear and pay all expenses and costs of such suit or suits, including all appeals, and hold the clients harmless by reason thereof.

(Testimony of Harold C. Morton.)

The said attorneys are authorized to do all things appearing to them to be necessary and proper in protecting the rights of the clients with respect to said suit (or suits) and they agree to diligently prosecute the same to their best ability."

The document you now hand me is the one that came back months later, signed by various members of the family themselves.

This document was received in evidence as Petitioner's Exhibit 11. It is identical with Exhibit 10 except as to date and signatures, and except also that immediately following the provisions of Exhibit 10 above set forth there appears in Exhibit 11 an additional paragraph [57] reading as follows:

"The said attorneys are hereby empowered and authorized to take all steps that, in their opinion, may be deemed proper to enforce the verdict and judgment that may eventually be rendered in favor of the clients."

Referring to Exhibit 11 and to the language, "The clients will pay to the attorneys the sum of \$30,000, etc.", we did not receive \$30,000, we received \$27,500 to put in trust. The \$30,000 figure was included in here at Mr. Lang's request. He wanted this contract to show how much total he had paid out up to that time in connection with the case.

The \$2,500 we received had nothing to do with the present employment on that contract. As I stated before, it was distinctly understood when we

(Testimony of Harold C. Morton.)

were employed in July and were paid the \$2,500 in August that there was no obligation on either party beyond that time. He was very definite. He said first they might not bring the suit, and second, they might not employ us as counsel. There is a particular circumstance in connection with this whole litigation that makes it simple for me to remember that exact situation, that we were not employed until October to bring a lawsuit.

The \$27,500 figure to be put in trust for expenses [58] was only arrived at after discussion in which I had outlined verbally to Mr. Lang and discussed at length the various items of expense that may or might be incurred in connection with this litigation. Some of them were the fact that the matters would require a great deal of expense for investigation of the values of these properties which had been sold in 1915 and 1917. The fact that it would be necessary to canvass old-timers in Kern County oil operations with a view to ascertaining witnesses. The fact that it would involve a large expense in the taking of depositions, undoubtedly a trip to Paris to take depositions of members of the family. And that it was litigation, the extent of which could only be guessed at, that is what I was doing, was making the best estimate or guess that I could.

The question of the value of the properties at the time of sale entered into it. This lawsuit involved a parcel of land situated in Kern County for which Fleishhacker and the Anglo Bank for years had been the agents for the people in France for that

(Testimony of Harold C. Morton.)

and other properties, having been paid an annual fee of \$3,000 to look after the properties. In 1915 they had sold 110 acres of this property for \$300 an acre, in fee. It was our contention that the land was worth at least \$3,000 an acre at that time, and that that fact was known to the agents of the Lazard family; hence the fraudulent conduct. [59] So there was the matter of going back all these years to establish the value of the property at that time, because subsequently, after the sale it proved to be very valuable oil property, and the necessity, of course, was to show that it was known to be such at the time of those sales many years before. I explained to him that it would be most difficult to get people for witnesses because of the power and influence of Herbert Fleishhacker in this State. In fact, Mr. Lang told me that he had been informed in San Francisco by three different sets of counsel that they would not take this case because it would be impossible to beat Herbert Fleishhacker in the courts of California. I assured him that I had confidence in the Federal Courts, and that would be where we would proceed, but those facts were discussed as facts which would call for, we believed, substantial expenditures to prepare the case and try the case and to fight appeals or to take appeals.

We were employed in October, definitely on it. The complaint was filed the following January. The case was tried at the end of 1937. That is, when the actual trial took place. During all those intervening years there were numerous proceedings in

(Testimony of Harold C. Morton.)

Court of the usual nature when you get a case that involves charges of fraud against prominent people with many lawyers involved, questions of our right to take depositions, questions of sufficiency of pleadings, [60] the taking of depositions, examination here and there.

The case was on trial I don't remember exactly but my impression is it was six or seven weeks in the Federal Court in this District here. The decision of the Trial Court was rendered in December 1937, and was rendered from the Bench by the Court stopping my final argument and forthwith rendering a decision and finding the defendants guilty of fraud.

Appeals were taken in the usual manner, and we finally got a check in January, 1940. The judgment at the time in the Trial Court was in round figures, \$650,000. When we got the check interest had increased it to \$746,354.94.

Referring to Exhibit 5, which is the card with No. 852 A at the top of it, and to the item of \$2,500 and also referring to Exhibit 8, which I have identified heretofore as the Trust Control Account, the item of \$2,500 which was received on August 19, 1932, does not appear on Exhibit 8, the Trust Control Account, for the reason that that item was never a trust item.

Referring to Exhibit 5, the \$2,500 is the first item there, on August 19, 1932, but the heading, "Trust Account" above, that was never put on this account

(Testimony of Harold C. Morton.)

until October, when we received the \$27,500. What occurred was the bookkeeper used the same ledger sheet that she had put the \$2,500 on, when this \$27,500 was received, and [61] inasmuch as that was a trust account, she at that time put that heading on that sheet.

On January 19, 1940, at the conclusion of this litigation, we received a free of \$121,700 and some odd dollars, made up of our 15% recovery on the large check that I identified, plus the fact that at that time we became the owners of the balance in the trust account pursuant to my arrangement with the clients.

Cross-Examination

When this Lazard matter first came up, in 1932, Byron C. Hanna and Harold C. Morton were the members of the firm of Hanna and Morton, and no one else. Mr. Lang first conferred with me and I believe I am the only one he ever conferred with until long afterwards he may have had conversations with Mr. Hanna. I handled the matter in its entirety as far as the members of the firm were concerned, from beginning to end.

Mr. Lang represented a number of relatives of his who were residents of France, which we describe generally as the Lazard family. There was no one else in this country with whom Mr. Hanna or I dealt directly. Mr. Lang came to us with powers of attorney under which he was acting representing these members of this family. He had been sent to this country by the members of the family

(Testimony of Harold C. Morton.)

as their agent to investigate this matter in 1931. I [62] believe his powers of attorney, most of them, were dated then. I have them.

I would say it was approximately one month after my initial conversations with Mr. Lang that the first \$2,500 was paid. He came to us in July and that payment was made in August. Mr. Hanna did not participate in any of those discussions or do any work in connection with the investigation up to the time of payment.

Mr. Lang came to us with a written opinion from the firm of Heller, Ehrman, White & McAuliffe, of San Francisco, and handed that opinion to me plus recitals of facts or possible facts and our discussions went from there and my opinions were given verbally along the line of the questions which had been presented in this other opinion from San Francisco counsel presented by Mr. Lang.

The \$2,500 was paid to us under the express understanding that it was for the advice I then gave him plus the preparation of this complaint, with the understanding that we were not employed to do anything further, and whether he came back and we were employed to conduct the litigation was entirely optional with them. He made it very clear that he was then investigating and was going to continue to investigate counsel, meaning us, and also that it was uncertain whether the members of the family would bring this litigation because they for many years had been very friendly with the Fleishhackers. They [63] had founded this bank in

(Testimony of Harold C. Morton.)

San Francisco, this family had, and had sold it to Herbert Fleishhacker's father-in-law in 1906. There existed for many, many years a cordial relationship which, of course, was about to be breached if such litigation would ensue. That was all explained to me by Mr. Lang.

The \$2,500 was paid after the fixed fee had been agreed upon and the work was being performed. I undoubtedly was working on the draft of the complaint at the time because the check was paid to me after we had agreed upon the amount and the work that needed to be done. I know the complaint was prepared by the end of August and it was a very voluminous affair.

That particular draft wasn't held until January 1933. That was delivered to Mr. Lang and he took it with him at the end of August. When we were subsequently actually employed to conduct this litigation, of course new pleadings were prepared, and finally, in January, I filed suit. It was all regarding the same subject matter, the oil lands in Kern County.

Exhibit 1 is not in my handwriting. It is in the handwriting of our then bookkeeper. The H.C.M. represents me. We have a system there. If I take in money in the firm a particular receipt book is used and the bookkeeper makes up the receipt and puts my initials on it. Mr. Hanna always writes his own receipts. I haven't [64] written one of those in many years. The bookkeeper makes them out. So that was made by Miss Goodyear, who was

(Testimony of Harold C. Morton.)

our then bookkeeper. You will have to ask Miss Goodyear what was mean by "on account. All I did was hand her \$2,500 and ask her to write a receipt for it and give it to Mr. Lang. It was on account and full payment of the services which we had agreed to do, as I have outlined to you two or three times. I mean it was merely for our record of our account to show money received. That \$2,500 was a fixed fee received for a definite service, the performance of which was completed by the end of August of that year. There is no relationship between that \$2,500 and any future sum to be paid upon the litigation or for services rendered or to be rendered. It might just as well have been that I never would have seen Mr. Lang again after the time I handed him the complaint. He was under no obligation to return. We were under no obligation to see him if he did return.

There was discussion about our future employment if agreeable to the parties in France. I told him I thought he had a good case and if he came back and wanted to hire us, I certainly would like to talk to him. I desired to represent them and go forward because Mr. Lang told me how three different firms had turned him down. He asked me if I was afraid to sue Mr. Fleishhacker. That being some years ago, and being somewhat younger, I said, "The bigger they are, [65] the harder they fall, and we will take them to the Federal Court and see." I sent a copy of the proposed complaint to Pierre Le Paulte, the French attorney who was

(Testimony of Harold C. Morton.)

advising them on that end. Mr. Lang undoubtedly may have submitted in some form to the other interests abroad some information regarding any contingent fee arrangement or the cost of litigation if filed. He and I discussed various arrangements, as I have said before. There was nothing in writing up to the time the matter was submitted abroad. As I remember, at one time I told him "We will take the case fifty-fifty and you don't have to put up anything." We had naturally in a case like that many discussions back and forth. There was no discussion at that time regarding the bringing of any kind of action in equity or at all with respect to any other matter except the matter in Kern County. There was discussion, as you know, from the agreement. You notice there is a 1911 transaction which is also mentioned on which suit was never brought, but that also was a Kern County transaction, although not the same land; another parcel of land.

Before the \$2,500 payment he had mentioned the fact that there had been a sale in 1911 which they were suspicious of, but the 1915 and the 1917 ones were the transactions which we were employed to draft the complaint on.

There was no written draft of any other proposed fee arrangement. They were discussed and I know we discussed [66] the question of a fifty-fifty arrangement where they wouldn't put up anything. That was when we discussed the entire matter, the very first time he came to me. He wanted to know

(Testimony of Harold C. Morton.)

how we would handle it. I said, "I don't know, I don't know enough about it." When I gave him the complaint, as he went on his way he said, "What about the arrangement?" I said, "We will talk about it when the time comes if you come back." When he came back we spent two or three days on fee discussion, and that I know was before we received the money. It was early in October. We didn't receive this money until the middle of October, the \$27,500.

There was no discussion regarding Mr. Lang or any of their interests putting up or advancing sums of money from time to time to cover costs of litigation, such as investigation and filing fee and so forth. Mr. Lang, when he came down when the fifty-fifty arrangement was discarded, Mr. Lang wanted a percentage arrangement plus an agreement as best we could reach that so much money would cover the expenses which they put up. And he wanted to know that it would be used for that purpose, with the understanding that what was left over would be ours.

Mr. Lang is in Southern California. He is engaged in oil operations on some of the family's properties in Kern County.

There was no estimate made of what these expenses [67] would run or what they would consist of except that I estimated that it might be \$20,000—it might be \$10,000, \$20,000 or \$30,000. There was no way of being exact.

As soon as the money was paid a certain amount

(Testimony of Harold C. Morton.)

was taken and used by the firm at that time. \$2,000 of that immediately and \$1,500.

We did not know that we would have to have that for expenses except for legal fees for ourselves. When Mr. Lang approved our taking that, it was with the understanding that it would be restored, and would be used because we were under the obligation to meet all expenses, even though the \$27,500 might be insufficient. That was pursuant to the agreement and the oral agreement as well. That was the understanding. Exhibits 10 and 11 are the only written contracts on the subject. It is true that there is no mention made of any trust accounts or funds to be maintained as such, but as I say, the \$27,500 was handed to us with that distinct understanding with Mr. Lang that it would be trust fund, would be so regarded and would be set up as such and from time to time he examined this trust account and was familiar with it.

Our running Lazard trust account, which would be Exhibit 5, was examined by Mr. Lang I am sure several times a year during its history. Probably one year it wasn't because there was one year when he was not here at all. I can't fix it exactly now. He was in France all of [68] one year. but otherwise every year he would go over matters, and we would discuss it with him. He was here working on the case almost constantly, except for that one period when he was in France for about a year. When I say here I mean in the United States. He was not in San Francisco most of the time after we

(Testimony of Harold C. Morton.)

started the lawsuit. He started his investigations in San Francisco.

I would say Mr. Lang was present personally and discussed with me on every occasion when any money was allocated to Hanna and Morton out of these funds. We never took money out of this trust account without his approval. Mr. Hanna was right here. Mr. Hanna was not present with Mr. Lang and myself when that was done. I am sure Mr. Hanna never handled these matters with Mr. Lang at all.

I did not discuss with Mr. Hanna anything about division of this and whether or not Mr. Lang's consent had to be secured. I am sure I advised Mr. Hanna that I had obtained Mr. Lang's consent to withdraw so many dollars from the trust account. I would be the one, with Mr. Lang's approval, to authorize any allocation from this trust account to Hanna and Morton. Mr. Hanna would have nothing to do with that. That approval was never in writing. Our firm did not render any statement of account to Mr. Lang or any of those interests regarding the exact status of this fund except that he saw this trust fund constantly, as I say. He may have had copies made of it. [69]

All kinds of expenditures over a period of many years on this litigation would be paid out of this account at my direction. That was just our firm account. Mr. Lang had nothing to do with it except it was kept with his knowledge and with his approval and his examination as well as ours. He

(Testimony of Harold C. Morton.)

was interested in the fact we were to use the funds for this purpose.

Between August 19, 1932 and 1940, I would say Mr. Lang looked at this account several times each year. It is difficult, perhaps, to understand, if you would know Mr. Lang you would understand he is a little fussy individual who was in everything all the time. And that is the reason our lawsuit was successful, because he is that kind of a person. He just goes into everything, and he knew that account better than I did.

Referring to Exhibit 3, the second item of funds expended is \$1,000 to myself. The next item is Byron C. Hanna, expense, \$1,000. Those are two checks written to us, Checks Nos. 348 and 349, each of \$1,000. When Mr. Hanna and I take money out of the firm, it is called "expense," and you will find that it is, or that that the same \$2,000 which is identified on Exhibit 5 at the corresponding time there.

Referring to August 19. That was simply withdrawal from the firm of what you might call partnership withdrawals, I guess, in August. In other words, Mr. Hanna and I got [70] \$2,500 on that day, and we each took \$1,000. That is out of the \$2,500 fee that we discussed a moment ago.

The daily financial report is a summary of all our receipts and disbursements for that date. Every check written and every amount received by the firm of Hanna and Morton appears on this current daily statement for that particular day. That is

(Testimony of Harold C. Morton.)

the way Mr. Hanna and I know what is going on; at least we hope we do.

That included fees of a general character as well as trust funds. You will notice how the trust fund is always segregated. When money comes in for trust purposes, there is a heading, "Trust" where the notation is made.

Referring to Exhibit 4 and to the item of Check No. 640 to the Bank of America for \$10,000, labeled "To Savings Account." We put \$20,000 of this \$27,500 that we received at that time in trust in two savings accounts because we realized we wouldn't be spending it all at once. We put it into savings accounts. That was a firm savings account under the name of Hanna and Morton. It was not labeled "trustee." I think we might have one now, one particular one, but none of our accounts were labeled "trustee." We carry trust funds in Hanna and Morton and show their trust character on our books.

The trust funds are shown on our records. It is a trust account for the clients and our daily reports and [71] our records show when funds are received in trust.

I believe that in addition to this savings account, our firm at the time had two commercial accounts, one in the Bank of America and the other in the Security Bank.

Referring to Exhibit 4, Check 641, payable to Security-First National Savings Account, \$10,000, I say we put \$20,000 in savings accounts; \$10,000 in

(Testimony of Harold C. Morton.)

the Bank of America and \$10,000 in the Security-First National Bank. That was done, as I said a moment ago, because we weren't going to spend all the money immediately, and with Scotch ancestry in me, and at that time it was not against the law for a partnership to have a savings account, which it is now. Mr. Lang knew about that. He watched those funds like a hawk. I don't believe Mr. Lang ever examined our daily reports, but he knew that \$20,000 of it was put in a savings account because I discussed it with him.

These sheets labeled "Lazard Matter" would not show the \$10,000 going out to each of those savings accounts. The account cards do not show the specific banking institutions in which the funds would be. That is shown on the daily reports. They do not show the two items of \$10,000 each, out. They would not because they didn't go out, so to speak. They were still in our bank accounts. The only items that would go on there would be if they went completely out of our affairs. Either Mr. Hanna or myself could draw on those two savings accounts.

[72]

I don't know whether counsel here has the savings account books or a transcript showing the complete entries of those accounts. I remember we had to close them out or something, and we couldn't have a savings account at some time.

Mr. Mackay: I have them both here.

We have the transcripts of accounts in each one of the banks. We have the transcript of the ac-

(Testimony of Harold C. Morton.)

count in the Bank of America and in the Security-First National Bank.

The transcript of the savings account with the Security-First National Bank of Los Angeles was marked Respondent's Exhibit A, and the transcript of the savings account with the Bank of America was marked Respondent's Exhibit B.

Exhibit A and Exhibit B were admitted in evidence.

Respondent's Exhibit A contains the following items:

(Security-First National Bank of Los Angeles
7th and Grand Branch)

Hanna & Morton

Account No. 16855

Date	Withdrawn	Interest	Deposited	Balance
Oct. 15 '32			10,000.00	10,000.00
6/30/33 Int.			222.91	10,222.91
12/31/33 Int.			153.33	10,376.24
6/30/34 Int.			155.64	10,531.88
12/31/34 Int.			144.80	10,676.68
				[73]
Jan. 2 '35	676.68			10,000.00
6/30/35 Int.			125.00	10,125.00
12/31/35 Int.			101.25	10,226.25
Mar. 31 '36	10,226.25			

Respondent's Exhibit B contains the following items:

(Bank of America National Trust & Savings Assn.)

Transcript of Term Savings Account Transferred

From Los Angeles Main Branch (No. 600) 4-27 1944

To.....Branch (No.) for \$.....

Savings Account No. 4460 in the name of Hanna & Morton

Closed by your Collection No.....

(Testimony of Harold C. Morton.)

Transcript of Account

Date	Withdrawn	Deposited	Balance
10-15-32		10,000.00	10,000.00
4-15-33	5,000.00		5,000.00
6-30-33	Int.	111.45	5,111.45
12-31-33	Int.	76.66	5,188.11
6-30-34	Int.	77.82	5,265.93
7-5-34	1,265.93		4,000.00
7-21-34	4,000.00		

Referring to Respondent's Exhibit A, that shows the first \$10,000 I have testified to. It shows interest credits, [74] the first one being for June 30, 1933, \$222.91, and then various other interest credits down under March 31, 1936. At the time I was familiar with that. The amounts withdrawn were transferred into our general accounts. I am inclined to think that is about the time that it became unlawful for a partnership to have a savings account. With reference to the withdrawal of interest in the aggregate amount of \$676.68 on January 2, 1935, we probably just withdrew the interest as such and put it in the general accounts. There was no division of the \$10,226.25 in 1936. I am sure that money was transferred into our general commercial accounts from out of the savings accounts.

Referring to Respondent's Exhibit B, that shows the initial \$10,000 that I have testified about. With reference to the withdrawal of \$5,000 on April 15, 1933, that was done simply because we were spending money chargeable against this trust account and wanted some of it in the commercial account on which the checks were being written. Mr. Lang did not have anything to do with the withdrawals

(Testimony of Harold C. Morton.)

from these savings accounts and the transfer to the commercial banks. He would have nothing to do with that. His concern was with the trust account as a whole. We didn't show the savings accounts to Mr. Lang. We told him that is what we were doing, that we were putting the money in savings accounts until such time as it would be [75] used.

With reference to the withdrawal of the final balance of \$4,000 in 1934 as shown on Exhibit B, that would go to the commercial accounts at that time. That was closing it out.

In 1934, prior to that time, \$1,265 had also been withdrawn and transferred to the commercial account.

These interest items were discussed with Mr. Lang. Mr. Lang said we could keep the interest and we could put it back if it was ever necessary to complete the payment of expenses, which was our obligation anyway, and I said, yes, that is what we would do.

I do not know whether anyone ever reported any of that interest received for income tax purposes, except Hanna and Morton have been reflected as the overall receipts of Mr. Hanna and myself. That is the only way it would be. I don't believe the French folks ever did. I say that, although I have never seen their returns.

Except as my discussions with Mr. Lang would be an account of it, there was no accounting made as to any of those interests as far as the bank interest items were concerned.

(Testimony of Harold C. Morton.)

Mr. Lang said, just as I said a moment ago. We were going to put this money in savings accounts to get some interest on it. He said, "You can take the interest if you are that careful," or something to that effect, [76] "if you will put it back in the bank if ever needed." If he had told us not to do it, we wouldn't have done it, that is a cinch. I do not think we could have done it, though. It was a trust fund, expressly understood to be such. Our only discretion was the necessary expenses in this litigation. Our firm was responsible for all expenses under the agreement even though they might exceed the trust funds. But our only discretion was I spend money where I thought it was necessary and proper out of this fund to promote this litigation. I discussed with Mr. Lang the placing of this money in the savings accounts when it went in, as I told you before. He thought that would be a good idea. The division was made as to two accounts just to put it in two different banks.

With respect to the difference between this control account and the other account that is reflected by the prior exhibits, the only thing of this same size, on this same size paper, you have the Lazard Matter account, which is Exhibit 5, then you have Exhibit 8, which is a control account of all our trust accounts of different clients. You see, we had various clients whose moneys we had in trust in and out with a running balance. Then when \$27,500 came in in October, you see it would increase that running balance of all our trust accounts. There is the

(Testimony of Harold C. Morton.)

case of Myers v. Texas Company. We had some [77] money in there, and so forth. Mr. Lang would not know about this control account. He would know about the particular trust fund which he was interested in. As we paid out expenses we charged it against the trust account. If I would pay \$37 to a Court Reporter for taking a little deposition, or \$100 to an appraiser for a report, why it was paid, our charge was written and it was charged against this trust fund. That would be reflected in this over-all account. It would be in Exhibit 5 which is headed, "Lazard Matter, Trust Account." For instance, here is an item to an engineer "Preparation of data and maps, Lost Hills, 156.25." It was paid and deducted from that card.

Referring to Exhibit 8, and to the item opposite October 15th, as to H.C.M. and B.C.H. Salary, Lazard, \$2,000, and October 31, charge, Lazard Matter, attorneys' fees, \$1,500, I do not know why that word "salary" was used, as I said before. Both items were payments to Mr. Hanna and myself, withdrawals for us, with Mr. Lang's approval, from these trust funds; hence they appear on Exhibit 8.

With respect to incidental costs of investigation and litigation. I don't know how thoroughly Mr. Lang checked Exhibit 5 from time to time. Of course, the principal items he would be familiar with because he was here with me most of the time. As I say, there was about a year when he wasn't here. I don't recall anything further about the [78] question of reporting interest received from this

(Testimony of Harold C. Morton.)

account by our firm as income of the firm. I would assume the firm reported it as interest received. We hire experts to prepare our firm's income tax returns and we sign them and make the auditors sign them, with a little notation that they are the ones who prepared the returns. I don't mind appearing in Court here representing clients in income tax matters, but I prefer to have an expert on my own.

I observe that on the 1932 income tax return of Hanna and Morton there is no interest reported for that year.

I observe that on the 1933 income tax return of Hanna and Morton an item entitled "Interest on Bank Deposits" and so forth \$780.19. I would presume that item should include some of the interest on those two savings accounts. I wouldn't specifically recall now. It may not have been because it may have been the interest was taken up in the year in which it was taken out. I don't know for sure.

The 1933 Partnership income tax return for Hanna and Morton was received in evidence as Respondent's Exhibit C. This exhibit contains the following entries among others:

1. Gross Receipts from Business or Profession	\$140,707.90
5. Interest on Bank Deposits, Notes, Corporation	
Bonds, etc.	780.19
	[79]
7. Rents	\$1,053.50
8. Royalties	1,680.57
9. (a) Profit from Sale of Stocks and	
Bonds held 2 years or less.....	1,235.21

(Testimony of Harold C. Morton.)

10. Dividends on stock of:		
(a) Domestic Corporations subject to Taxation under Title I of 1932 Act	347.50	
12. Total Income in Items 3 to 11.....		\$145,804.87
DEDUCTIONS		
13. Salaries of Employees	29,537.51	
14. Rent on Business Property	8,245.00	
15. Repairs	120.05	
16. Interest on Indebtedness	1,974.63	
17. Taxes paid	453.65	
20. Depreciation, Obsolescence, and Depletion	1,471.19	
21. Other Deductions Authorized by Law:		
Per Detail	8,316.38	
Donation, Amer. Red Cross, 25.00; L. A. News Boys Club, 5.00.....	30.00	
22. Total Deductions in Items 13 to 21		50,148.41
23. Net Income		\$ 95,656.46

[80]

It does not contain any schedules showing the items comprising Item 5 of Gross Income.

The 1934 income tax return of Hanna and Morton shows an item of interest of \$741.56. As to whether that includes interest on those two savings accounts, I would have to answer in the same way as I did with respect to 1933.

The 1934 income tax return of Hanna and Morton was admitted in evidence as Respondent's Exhibit D. This income tax return contains among others the following items:

(Testimony of Harold C. Morton.)

GROSS INCOME

1. Gross Receipts from Business or Profession	\$169,258.98	
5. Interest on Bank Deposits, Notes, Corporations Bonds, etc.	741.56	
7. Rents—Bungalow Court	1,116.54	
8. Royalties	2,721.21	
9. Capital Gain (or loss).....	3,386.85	
10. Dividends on Stock of:		
(a) Domestic Corporations subject to Taxation under Title I of 1934 Act	475.00	
12. Total Income in Items 3 to 11.....		\$177,700.14

DEDUCTIONS

13. Salaries of Employees	\$ 36,072.56	
14. Rent on Business Property.....	8,807.50	
15. Repairs	210.70	
16. Interest on Indebtedness	1,125.65	
17. Taxes paid	372.36	
21. Depreciation	1,789.60	
22. Other Deductions Authorized by Law	8,506.99	
23. Total Deductions in Items 13 to 22.....	56,885.36	
24. Net Income		\$120,814.78

It does not contain any schedules showing the items comprising Item 5 of Gross Income.

The partnership income tax return for the calendar year 1935 of Hanna and Morton was received in evidence as respondent's Exhibit E. It shows an item of interest received reported as Item 5, of \$419.29.

I think during some of those years the Partnership owned some securities, but I, of course, don't

(Testimony of Harold C. Morton.)

remember what particular items would apply to what now.

The rule came out that a partnership couldn't have a savings account. I don't believe after that we had a savings account. I am quite sure neither Mr. Hanna nor I used individual accounts as a subterfuge to evade that regulation.

The 1936 income tax return of Hanna and Morton contains an interest item of only \$63.69.

In January 1933 the suit was filed over the 1915 and 1917 sales, that is what we call the Kern County suit, and that was the one, the history of which I previously gave. [82] That was the one we discussed about and prepared the draft of complaint on. That suit was filed as an equity suit to recover possession of the property and an accounting of the profits therefrom. In the course of the actual trial, the Trial Judge on the grounds of the Statute of Limitations only, ruled in favor of all defendants at the conclusion of my case, except the Anglo Bank and Herbert Fleishhacker. The other defendants had the property. That changed it to a law action, and by stipulation the case was transferred to the law side of the Court. A jury trial was waived. We continued on with the trial. That is the main case that was concluded and the same one on which the contingent fee was paid in 1940.

Outside of that one case there were discussions with the Lazard interests regarding the filing of other suits and the taking of other legal action. Some time after this employment in October of

(Testimony of Harold C. Morton.)

1932 a matter came up of certain members of the family who were still stockholders of the Anglo Bank in San Francisco, making a demand on the directors of that bank to proceed against Herbert Fleishhacker for an accounting of profits allegedly made by him in connection with certain transactions with parties by the name of Barde, in Portland. The facts in connection with that case came to light first in the investigation of the main case. That matter was first mentioned by the end of 1932. I believe it was in 1934 [83] that a suit actually was finally filed by some of the members of the family as stockholders, after demand and refusal of the directors of the bank to take proceedings. That for convenience is called the Blum case, or Barde case. It was filed in the Federal Court in San Francisco. Our only fee arrangement with respect to that was it being a minority stockholders suit, it was one in which if we were successful under recognized principles of law, the Court would award us fees to be paid out of the funds recovered in such action. That case was tried before Judge St. Sure in the middle of 1937. It was tried before the Kern County case. Some of the members of the family were plaintiffs, and there were some plaintiffs who were not involved in the Kern County case. We received a fee in that case at the end of that trial which was allowed by the Trial Judge because we were successful in recovery. In other words, that is what is called a stockholder's derivative suit. We were successful and the Judge allowed us a fee payable

(Testimony of Harold C. Morton.)

out of the recovery. We did not receive a fee from the clients as such.

We had counsel associated with us in that case. The Judge allowed us 10% of the recovery. His judgment, as I remember, was \$700,000. An appeal was taken. When the affirmance came back he allowed us an additional \$35,000. In the meantime, Fleishhacker had gone into bankruptcy and I believe it was in October of 1941 that we [84] finally received \$40,000 to cover that entire situation. That bankruptcy proceeding is still pending. We disposed of all of our claims for attorneys' fees and expenses to the Anglo Bank, a creditor of the bankrupt. Mr. Fleishhacker's bankruptcy proceeding was first filed at the end of 1938. He was not adjudicated until some time thereafter. At that time the Kern County case had been reduced to judgment and was on appeal to the Circuit Court of Appeals for the Ninth Circuit. It was the Barde case that precipitated the bankruptcy proceedings, because there was no stay of execution in that case.

In the Bankruptcy proceedings I made a motion for the appointment of a receiver. That must have been at the end of 1938, which was contested over a period of time and which resulted in the appointment of a receiver. We simply filed claims, and a receiver was appointed, and that was that. We followed it up as to the hearings. I still get notice of all the hearings. I don't attend them but I still get notice of them. The Bankruptcy proceeding is still pending.

(Testimony of Harold C. Morton.)

We had no fee arrangements with respect to the Lang interests regarding the filing of our claim in the Bankruptcy case. We just filed those claims as a matter of protection for these two judgments that we were interested in. We had to file the Kern County judgment claim. We filed a claim in behalf of the judgment which had been obtained in San [85] Francisco. You know the time for filing was fixed and we filed them. I don't know as we dealt with anybody on the protection of our judgment. As a lawyer I knew these claims should be filed and the matter should be watched and we did so. Subsequently Mr. Moore who was our associate and ourselves were allowed a fee by the Bankruptcy Court, payable out of the bankruptcy, for bringing about the appointment of a receiver. I think it was \$5,000.

Mr. Fleishhacker filed his Bankruptcy proceeding in 1938. He applied for the appointment of a creditors' committee or something. I came in and appeared and on behalf of these two judgments of these creditors made a motion for the appointment of a receiver. Several days were spent in evidence on that, with arguments on each side, and the receiver was appointed. Mr. Sterling Carr, of San Francisco, a well known lawyer, was appointed. Meantime our appeals were on their way up. This Kern County case was being appealed, as was the San Francisco case. The receivership was discussed with Mr. Lang. I don't think he was in the country at the time that the application was made. That bankruptcy proceeding was a very elaborate and

(Testimony of Harold C. Morton.)

complicated affair because of Mr. Fleishhacker's affairs, which had many ramifications, which I have not followed. We did not take an active part in it.

Some time in 1939, I believe it was, Mr. Fleishhacker [86] consented to an adjudication. I had nothing to do with it. I just know that it occurred. I don't think I ever attended a hearing in the Fleishhacker bankruptcy after we had the receiver appointed until an application was made by Mr. Moore and ourselves for an allowance of compensation out of the bankruptcy for having the receiver appointed. I can't fix that year for you but it was in 1939 or sometime subsequent. I would think it was 1940 or 1941. I could get that date for you. The bankruptcy continued through 1941 and has continued right down to date. The man who had been appointed receiver became trustee after the adjudication.

I believe it was in the month of October or September that we disposed of our claim. By "we," I mean Mr. Courtney Moore and our firm. Our claims for fees and expenses which had been allowed by the Court we sold to the Anglo Bank for a fixed sum and they stepped in in our place. They owned about five-sixths of the total claims in the bankruptcy anyway, and I guess were acquiring all of them, or were trying to. In other words, we didn't wait liquidation in the form of dividends to receive the fees allowed us. I did not keep in touch with that matter in 1942 or in 1943. In 1941 I did not discuss what action I had taken, as I have testified.

(Testimony of Harold C. Morton.)

That was none of his concern. I am sure I never discussed it with him. I saw Mr. Lang in 1941. He came to this country early in 1940 [87] and has been in this country continuously since. I had no discussion with Mr. Lang in 1941 regarding either the bankruptcy matter or any aspect of it or the Kern County litigation. The Kern County litigation was completed and finished and tied up and over with on January 19, 1940.

We did not receive any additional money from Mr. Lang or any of the Lazard interests after the receipt of this contingent fee in 1940 for any legal services rendered them, with the possibility that we probated some estates in Santa Barbara of certain deceased persons, and we might have received fees for those probate services after that date. We received nothing additional in the Kern County case.

Nothing further was received in connection with this Portland case after we received the contingent fee in 1940. The Portland fee was actually received in October of 1941, but there was no work done on that case after that time in 1941. I undoubtedly told Mr. Lang what happened but that would be all.

The Portland matters and the Kern County matters lapped over each other. I think the Portland case was filed in 1934. We had San Francisco counsel associated with us in that case, Mr. Courtney L. Moore of that city. There was still another case, which we called the Market Street case, which had substantially the same plaintiffs as the Kern

(Testimony of Harold C. Morton.)

County case. The facts of that case were discovered [88] during the course of working on the Kern County case. That was brought in the Federal Court in San Francisco. It involved the sale of a piece of property by the bank for these French folks in 1925, and we discovered that the bank, without bothering to tell the folks in France, had kept \$8,250 of the purchase price. I brought suit on that, I believe, in the latter part of 1934. That case was never tried. They paid off on that finally, without a trial. That was not handled under similar arrangements as the Kern County case. We discovered those facts, and I filed a suit, and the thing dragged along. We never discussed a fee arrangement. When they paid off, Mr. Lang and I discussed it and I think they had us retain a third of the recovery in that item. Mr. Moore of San Francisco was likewise associated with us in that case. They paid off in this case in 1938, following the other two trials. That case was on the calendar early in 1938, and instead of trying it they paid the amount of the demand, plus compound interest from the time of the take. We did not have a trust account for that litigation. We did not receive any money or initial retainer or for expenses in that case. Mr. Hanna did not have anything to do with that litigation except as I told him we brought the suit and what happened to it. It was our firm's action. In order to make that clear, Mr. Hanna and I perhaps have a peculiar partnership. This [89] is the fourth time in seven-

(Testimony of Harold C. Morton.)

teen years of law practice that he and I have gone to court together on the same matter. I came here as a witness in this case. We each handle particular cases or matters. Mr. Hanna paid no attention to the Lazard cases. Of course I would tell him of the developments. When he handled litigation, I might say to him, "What happened to such and such a case?" If it were over with, I would keep watching to see if the money came in. Our partnership is very unique. It is an equal partnership. Our only dispute is as to who gets to use our assistants because they are diminishing.

Our books and records are kept on a cash receipts and disbursements basis. We don't count it until we get it in. That is the system we had in the years from 1932 through 1940.

Some times during the period between 1934 and 1938 when I was discussing the Kern County litigation with Mr. Lang I would also discuss the Market Street case with him. As a matter of fact, he discovered the Market Street situation while we were in San Francisco together working on the Kern County case. I asked him what other sales had taken place, and he said there had been a sale of property in San Francisco in 1925 for \$150,000. I said, "How about it?" I said, "Go out to the Recorder's office. They have to put revenue stamps on the deed." He came back and said [90] \$165,000 of revenue stamps were on the deed. That led to the discovery. We had a definite agreement in

(Testimony of Harold C. Morton.)

writing with all the various people as shown by Exhibit 11 with respect to the Kern County litigation before we filed the action in the Market Street case, and long before we even knew there was a Market Street situation. The Market Street case was just a text book case. It was a text book case of fiduciary fraud. When they wanted to settle the case and offered me principal and interest, I refused to take it unless they compounded the interest, which they did. There is absolutely no relationship whatever insofar as any compensation is concerned between these two cases. There was no connection between them at all. The one was discovered while working on the other. A different fee arrangement was applied.

There was a good deal of discussion prior to arriving at the figure of 15% contingent rate. We visualized this might result in millions of dollars of recovery, as you can see by the reading of the contract. There were many discussions of percentages and finally we agreed upon 15% if they would put up the money to be used for the costs. It was also agreed that whatever might be left over at the end of the road would be fees.

I drafted Exhibits 10 and 11. I dictated them after consultation with Mr. Lang, with Mr. Lang present in the office. The first paragraph with a heading on the [91] first page is labeled, "Fees and Costs." The very next paragraph after that caption said "Clients will pay to the attorneys \$30,000. and a contingent fee." The actual facts were, as I

(Testimony of Harold C. Morton.)

have stated them—the actual agreement is as I have said. On the top of the next page there is a paragraph: “Said attorneys agree in consideration thereof they will bear and pay all expenses and costs of such suit or suits, and hold the clients harmless by reason thereof.” We agreed to do that in consideration of them putting up the \$27,500. There is a separate paragraph dealing with expenses and costs, and that says that we agree to pay them. The language of the document is that that is in consideration of their payment of \$30,000 as shown by the prior paragraph. That is exactly not what was agreed upon. The \$30,000 was put in there because Mr. Lang wanted the \$30,000 recited, as I said before. He did not pay this \$30,000 as a fee or any other amount as a fee, except as previously we had been paid \$2,500 for an isolated service. The other amount, which would make the total of \$30,000 was the \$27,500, which it was expressly agreed would be in trust and we would receive as a fee that which might be left over at the end of the litigation. I am giving you the true consideration for this agreement, the one which was discussed and the actual understanding between the parties. It was because of that that the money was set up in trust. [92]

We didn't take the \$30,000. We did take money out. We took money out of it on certain instances as I have stated, with Mr. Lang's approval on each. Mr. Lang cared whether we took it out or not. I

(Testimony of Harold C. Morton.)

wanted to take more than we did in October of the next year.

These records are control records and the Lazard trust records certainly are internal records of our office. They are records which we kept of our business transactions. We think there was a separate trust fund set aside in the usual sense of a trust. We think when we earmark these things and show our balance to be only that which is left after deducting the costs, we have done that. We did not render a written statement to Mr. Lang or any of these people regarding the exact status of that account, except Mr. Lang had access to Exhibit 5 at all times, as I have testified. He may have taken abstracts of this off.

I did not attempt to allocate my income taxes back under Section 107. Mine was an entirely different situation. I have some rather extensive business interests outside and it made no difference in my tax situation. It couldn't have made much difference, or it would have been allocated over the years. [93]

Redirect Examination

The judgment in the Kern County case was against the Anglo Bank and Herbert Fleishhacker. It was fully satisfied January 19, 1940.

Thereupon the further trial of the case was adjourned until April 28, 1944 at 10 o'clock a. m.

At that latter time the redirect examination of Mr. Morton was resumed as follows:

(Testimony of Harold C. Morton.)

After the Kern County case was finally settled and we had received the fee to which I testified yesterday, we paid to one of the men in our office, one of the men employed by us, the sum of \$5,000. That was Leon Brown. Mr. Lang and I, jointly, he out of his own affairs, or his family's affairs, and ourselves, together, paid Mr. Ben Dudley \$3,000. We wrote the check and Mr. Lang reimbursed us for half of it. The effect was that our firm paid \$1,500 to Mr. Dudley. These two payments were made after the matter was completed.

Recross Examination

With reference to a payment to Mr. Dudley, we wrote the check for \$3,000, and I remember cashing it for Mr. Dudley, because when I told him we were going to let him have it he asked if he could have it in cash. Then Mr. Lang reimbursed us for half of the \$3,000. Mr. Brown was not a [94] member of the firm. Mr. Brown, like a number of other lawyers we had employed with us, was employed on a basis—we paid him a salary, so much a month, and it has been our practice over the years when one of the employees in the office worked on a particular case, when that case it over, we give him a check. You might call it a bonus, or what have you. In this case, after it was over Mr. Hanna and I discussed the matter and decided to give Mr. Brown \$5,000. Mr. Brown worked on the Kern County case. He attended the trials of the Kern County case and assisted me on that case. He may have worked incidentally in our office in connection with other mat-

(Testimony of Harold C. Morton.)

ters for or on behalf of the Lazard interests, but not particularly.

In response to a question as to whether the witness recalls as to whether Mr. Brown had anything to do with any income tax matters of Francois Lang and others of the Lang interests in connection with a question of deductions for legal expenses, the witness stated there has been some tax litigation arising out of that recovery going on ever since the recovery. I had only known of it sort of remotely. I think Mr. Brown was in it from the beginning, and while he is no longer with our firm, I think that litigation was finally disposed of here, if I am not wrong, sometime within the past several months. It would be my recollection that it was concluded within recent months. I couldn't tell you definitely. I could not recall by [95] citation whether that is the case of Francois Lang, 45 BTA-256. Show me the book and I am sure I will be able to see if there is anything in there I can identify.

Whereupon the witness was shown the volume and then testified: I am sure it is the same Mr. Brown we were talking about, and this is undoubtedly that proceeding before the Tax Court, which was then known as the Board of Tax Appeals. I suppose you could say the firm of Hanna and Morton to some extent was in that case. Mr. Brown handled the matter. I think it went to the Circuit Court of Appeals after that.

Whereupon counsel for Commissioner presented to the witness a document purporting to be a mimeo-

(Testimony of Harold C. Morton.)

graphed copy of a certain stipulation of facts, which was marked Exhibit F for Identification. The witness proceeded to testify as follows:

I would imagine that either Mr. Hanna or myself may have been counsel in this case sometime. I noted in the beginning of this case it only refers to Mr. Brown. Exhibit F for identification contains my name and also Mr. Hanna's name and Mr. Brown's is the third name. There are three typewritten names, Hanna, Morton and Brown; and the typewritten signatures by Leon B. Brown, and that is Mr. Brown's signature. Mr. Brown signed it in connection with that case. It is also signed by counsel for the Respondent in that case. The item of \$30,000 at the bottom [96] of page 11 must have been the \$30,000 which has been referred to in the subject Hanna case.

The Respondent's Exhibit F for Identification was received in evidence as Respondent's Exhibit F. In so far as material here it may be described as follows:

It is a stipulation entitled, "In the United States Board of Tax Appeals" and bearing the title of nineteen proceedings before the said Board of Tax Appeals, Docket No. 102740 to 102758, inclusive, the first of which is Francois Lang, Petitioner, v. Commissioner of Internal Revenue. It stipulates certain facts with respect to the Kern County litigation and the realization therefrom as effecting the income tax liability of the petitioners in these various proceedings. After referring to the recov-

(Testimony of Harold C. Morton.)

ery of judgment in the Kern County case it proceeds with the following language:

“6. On January 19, 1940, the full amount of said judgment, together with interest thereon in the sum of \$92,644.93, or a total of \$743,925.60, exclusive of taxable costs, was received by the above-named petitioners from counsel for the Bank and Fleishhacker in satisfaction of said judgment.

7. The attorneys for the above-named petitioners in said proceedings were entitled, under a contingent fee contract, to 15% of any recovery obtained by theme in said proceedings. On January [97] 19, 1940, the above-named petitioners paid to said attorneys, for their services in said proceedings, the sum of \$111,588.84, * * *

8. Between April 1, 1931 and January 1, 1939, the above-named petitioners expended various sums totalling \$150,000, which expenditures were in addition to sums for which recovery was had as taxable costs in the proceedings referred to. * * * Said amounts were expended as follows: * * *

\$30,000 Paid to Hanna and Morton, attorneys for the above-named petitioners in the said proceedings, as retainer fees; \$2,500 of which was paid September 2, 1932, and \$27,500 on October 12, 1932;

* * *

Dated this 20th day of February, 1941.

BYRON C. HANNA

HAROLD C. MORTON

LEON B. BROWN

(Testimony of Harold C. Morton.)

By LEON B. BROWN

Counsel for Petitioners

J. P. WENCHEL,

Chief Counsel, Bureau of Internal Revenue,

Counsel for Respondent

Of Counsel: [98]

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ALVA C. BAIRD,

Division Counsel;

FRANK T. HORNER,

HARRY R. HORROW,

Special Attorneys,

Bureau of Internal Revenue."

The witness proceeded to testify as follows:

The \$30,000 item mentioned in that stipulation must be the same dollars and cents that is involved in the subject case. Of course it is an erroneous statement, as you know from my testimony yesterday. I might say I have never seen this document before or the original of it before. I had nothing to do with its preparation. I did not know whether or not the Lazard interests treated the \$30,000 as legal fees or retainer. I never prepared any of their returns or never saw any of them. a

It was stipulated that the reported decision, Francois Lang, 45 BTA-256 may be considered as a part of the record in the present case for reference purposes, with the reservation that such stipu-

(Testimony of Harold C. Morton.)

lation should not be considered as a stipulation of any of the facts in that proceeding.

As to whether there was any connection between the Oregon litigation and the Kern County litigation, I suppose it would depend upon what you mean by "connection." As I told you yesterday, the facts regarding that Portland [99] case—we will call it that for convenience—the first facts were discovered during the work on the Kern County case. The Oregon litigation was the Blum case. My best recollection would be that it was filed in 1934. When those facts came to my attention, I associated San Francisco counsel with me. That was, as I explained yesterday, a stockholders' derivative proceedings where on behalf of certain stockholders we made demands on the bank to sue Fleishhacker, and when the Board of Directors ignored that demand, then we brought suit. That suit was brought in the Federal Court in San Francisco. It was tried in San Francisco in the summer of 1937.

In October of 1941, a check for forty some thousand dollars was received from the Anglo Bank purchasing all the interest that Courtney Moore and ourselves had, and the fees which had theretofore been allowed to us by the Court. I don't have the exact figure in front of me, but approximately \$20,000 of that was received by Mr. Moore, and something over \$20,000 by ourselves. I could get you the exact figure.

In the Market Street case, when we received a check on that, which was in the early part of 1938,

(Testimony of Harold C. Morton.)

we received a third of the amount. The \$8,250 principal sum with compound interest, amounted to approximately \$19,000 when the check was written. Our firm received slightly more than \$6,000 in that case as a legal fee; one-third in [100] in that particular matter.

Referring to ledger card 852, being Petitioner's Exhibit 6, I observe entries in the center of the page referring to Morton's trip to Portland and so forth. That referred to the Blum case. There were some items of expense in connection with the Blum case paid out of these funds with Mr. Lang's consent, with the understanding that those funds were reimbursable to this particular trust fund when and as that might become necessary. There are a number of items here that if I looked at, I could probably identify as Blum matters. The items were reimbursable by Hanna and Morton. In bringing this stockholders' derivative suit we knew that if we were correct and were successful our expenses and fees would be allowed by the Court out of the funds recovered. As in all litigation, expenses were incurred as we went along. I took the matter up specifically with Mr. Lang and secured his consent to use some of these trust funds for that purpose, with the understanding that we would restore them here when and as it became necessary to do so to complete the Kern County case. We also regarded these as borrowings from this trust account, with the consent of the client. Mr. Lang did not give us any new money to cover Oregon expenses. When that suit

(Testimony of Harold C. Morton.)

was started and I knew there were going to be expenses I took the matter up with Mr. Lang that there would be expenses. We discussed the matter and [101] I asked permission to use funds from this trust, from the \$27,500, for that case, with the understanding they would be returnable to make up this fund as it became necessary to do so. Our firm and the parties did not consider that that was covered by the two written agreements, Exhibits 10 and 11. The written agreements only covered the lawsuits they referred to. There were no other separate or similar agreements relating to this other litigation. As far as fees were concerned in the Blum case, that was a matter in which we could only get a fee such as the Court might award us if we were successful in that litigation. In other words, there was no fee agreed to be paid by the nominal clients, the plaintiff stockholders who were named as plaintiffs in the suit.

Referring to Petitioner's Exhibits 7, items referring to the Blum case are rather easily picked out. You will notice Portland mentioned. You will see from the Marshal at Portland, which would be a refund in connection with some service fee, I would assume, or something of that kind. They probably took a deposition up there. You probably would find in some places some traveling expenses, possibly mine, because I remember going to Portland on a couple of occasions in connection with this matter.

(Testimony of Harold C. Merton.)

With reference to the item, on October 31, [102] "Trans. from Trust-fee, \$1,000.00," with a "P" after it, the "P" doesn't mean anything. That is the \$1,000.00 I testified to yesterday we withdrew at the time. That does not relate to the Portland matter. That would be Kern County. We had no fees or anything you could call fees on the Portland matter until finally we disposed of our interests and fees which had been awarded, by the sale thereof to the Anglo Bank, as I have testified to. Many of the expenses came out of this Lazard trust account. The reference to a case of Dido versus House in Kern County, appearing on Exhibit 7, is part of our Kern County litigation. It is a long story. It has to do with establishing some title. We took a deposition up there.

Referring to Exhibit 8, the first item is the Lazard matter. You will observe here that it is the \$27,500 which is the credit here. Then crowded in under that is the \$2,000 which we withdrew from the trust account at that time with Lang's consent. As I said yesterday, I don't know why the word "Salary" was put there. The items are rather crowded together.

Whereupon,

BYRON C. HANNA

was called as a witness by and on behalf of the Petitioner; and having been first duly sworn, was examined and testified as follows: [103]

(Testimony of Byron C. Hanna.)

Direct Examination

I am the law partner of Mr. Morton who just testified. Mrs. Hanna and I were married July 16, 1916 and have been ever since. I have resided in California, in Los Angeles, for over fifty years.

I handled the satisfaction of judgment that was obtained by the Lazards against the the Anglo Bank and Fleishhacker in 1940. On January 19, 1940, the satisfaction was made in open court. The Anglo Bank paid the judgment, and at that time paid \$746,354.95, for which I received a check in open court and satisfied the judgment in open court. The firm of Hanna and Morton received \$114,018.19 out of that amount. That was on the 15% contingent fee and reimbursement of some costs which we had expended from this trust fund and which were taxable as costs and recovered in the judgment. The amount of the costs was \$2,429.35 and the 15% contingent fee amounted to \$111,588.84, making a total which we received on that date of \$114,018.19. That was on January 19, 1940, and that is when our services were concluded.

The firm of Hanna and Morton kept daily financial records, showing receipts and disbursements. Whenever money was received for specific purposes, it was designated as a "Trust". We maintained a system under which we had each day a daily statement of cash received showing whether it was for trust account or for our own account. The daily [104] statement contained the expenditures for the

(Testimony of Byron C. Hanna.)

day, showing whether it was from our own account or from trust account; showed the balance of trust obligations, the balance in the bank and the net amount which belonged to the firm of Hanna and Morton. During the period from 1932 to 1940 the amount kept in our various bank accounts equalled or exceeded the amounts charged up in the trust accounts.

Cross Examination

The original firm name was Fredericks, Hanna and Morton. That was J. D. Fredericks, Sr. Subsequently he retired—it was long before this—and his son, J. D. Fredericks, Jr., became a member of the firm with Mr. Morton and myself, and we carried on the old name of Fredericks, Hanna and Morton until June, 1932, when Mr. Fredericks, Jr. retired from that firm; and at all times subsequent to that the firm has been Hanna and Morton. I am the oldest member of the firm.

I am familiar, in a general way, with the Lazard litigation. I did not personally handle the matter. In our office our work is principally trial work. Mr. Morton handles cases that come to him, and I handle cases that come to me. I think the only appearances I made in connection with the cases that Mr. Morton testified about was when I went up and satisfied the judgment and collected [105] the money. That is in the Federal Court in the Kern County case. I did not appear in court at any time in connection with any other cases, but perhaps at

(Testimony of Byron C. Hanna.)

times we would confer in the office or consult about questions of law or policy to be pursued, but these were very infrequent occasions. I do not have a definite recollection of any particular occasion when there was such a conference in connection with the Blum case, but my best recollection is there may have been occasions when we did. I knew that Mr. Morton was actively engaged in the Blum case at Portland. Mr. Morton and I were equal partners. We were interested in the work that the other partner was doing, and naturally we would discuss that progress. I knew that the Blum case was part of the firm's business. I knew about the Market Street litigation in San Francisco when it was going on. I had a general knowledge of it. So far as I recall, the dates and figures that Mr. Morton testified to are substantially accurate, but I have no recollection of those dates or figures. I have no recollection of any different dates or figures. So far as my recollection goes, the dates and amounts which Mr. Morton testified to with respect to the Blum case at Portland, are substantially correct. I do not recall anything differently about those dates or amounts.

Our firm records were kept on the accounting basis of cash receipts and disbursements, with some modifications, [106] I believe. I am not an expert accountant, but I think there were some modifica-

(Testimony of Byron C. Hanna.)

tions, when, for instance, I think we deducted depreciation on our library and office equipment and so on. And there have been some minor items of that kind that were not on a strict cash and disbursement basis.

With respect to receipts or retainers during the years 1932 to 1940, we did not accrue any proposed fees in advance of actual receipts. When we would receive money to pay expenses, we would set it up in our trust fund.

The Lazard trust record which is in evidence, as shown by Exhibits 5 through 9, originally referred only to the Kern County matter. Our bookkeeping system was quite informal, and Mr. Morton and I were both very busy and didn't have much opportunity to supervise it on occasions, and it happened that when we started with one employment and another employment would arise, the whole thing would be carried along in one account until some occasion arose for segregating it.

The card numbers on Exhibits 6, 7, 8 and 9 have no significance. The ledger sheets had a printed number, consecutive number on them, but we did not keep track of those printed numbers. We just used the sheets when occasion arose. As to matters under the Lazard Trust captions, those were not all limited to any particular case, as far [107] as expenses and charges were concerned. Mr. Morton, I think as explained, and I can only add the same information, that there were items of expenses in this Lazard Matter trust account, Exhibits 6 and 7, which

(Testimony of Byron C. Hanna.)

related to the Portland case and I think maybe one or two that related to the Market Street case.

Originally there was no maintenance of separate sets of records in our office for the various suits that our firm filed for and on behalf of the Lazard interests. It was all run through one account. There was a maintenance of the trust funds, of course, at all times. Then later it was segregated into different accounts relating to different employments. We had a record of the trust money that came in, and we had a record of the trust money that was expended on the Kern County case and we had a record of the trust money that was borrowed to be used on the Market Street case and the Portland case. Not a segregated record. The trust funds were segregated. I will show you a record that is available in the court room, showing that the money was actually set aside as money. We have produced here Exhibit 4, which shows on the financial statement of October 15th that the entire \$27,500 was placed in trust. The money was all carried in the general bank accounts, which has been our policy and practice for many years. But we carried on our own records a designation of the trust funds. [108] It was to reflect the fact on our own records that these were not our moneys.

I had nothing to do with the drafting of the agreements, Exhibits 10 and 11, but Mr. Morton and I discussed various terms under which we might undertake this employment. I think that the agreements do not correctly show the consideration that

(Testimony of Byron C. Hanna.)

was received. As to the \$2,500, there was never any discussion about that. That was a fee for work that was done prior to—I think that work was terminated about the 31st of August, 1932, and at the conclusion of that work there was no continuing relationship between the clients and ourselves. We were dealing with some clients who were across the seas and beyond the reach of the country through agents who had a power of attorney to represent them. Exhibit 11 was signed, as it shows on its face. Exhibit 11 does not correctly express the consideration.

With reference to the Francois Lang and related taxpayers' income tax cases, I think the only extent to which I participated in that litigation was that I was present in the Circuit Court of Appeals when it was argued. I believe that this is the case that went to the Circuit Court of Appeals and I discussed with Mr. Leon Brown, who argued this, some of the legal questions involved prior to the argument, and counseled with him about the presentation of the case. [109]

Mr. Brown did not discuss the handling of the case with me with respect to a submission on a stipulation of facts while it was going on in the United States Board of Tax Appeals, except in a general way. We knew we had a case involving the questions of the income tax of these people, but Mr. Brown was handling it.

I am sure that when I prepared my income tax report for 1940, I did not check at all with the Lang

(Testimony of Byron C. Hanna.)

case and the stipulated facts there, which were filed on February 20, 1941. I am sure at that time that I was not cognizant of that stipulation, and I would like to add this further explanation: That this item of \$30,000 that has been referred to was merely treated by the clients as a deduction incident to the litigation. Mr. Brown did not ever bring that to my attention. Mr. Lyons did not discuss it with me. Whether it had been for costs or trust or what it had been for was immaterial in 1941. The clients were out in 1941 the \$30,000. There was no materiality at that time as to the circumstances or conditions under which they expended the money. They had actually expended it in connection with the work that was done, first preliminarily and later in connection with the litigation.

Referring to my testimony that at the conclusion of the Kern County litigation we received out of it the sum of \$114,018.19, and Mr. Morton's testimony to a figure [110] of \$121,700, I didn't testify to the same question that was asked Mr. Morton. I said that we received \$114,018.19 out of the recovery on January 19, 1940. We also had in the trust account at that time \$7,769.55, which was released to us, and that makes a total of \$121,787.74 received in 1940. The amount that we received out of the judgment in cash on January 19, 1940, was \$114,018.19, and we were then holding under the obligation of a trust \$7,769.55. We were released from that obligation, and that gave us a total recovery in 1940 of \$121,787.74.

There was something relating to the obligation

(Testimony of Byron C. Hanna.)

which I say we had, except Exhibits 10 and 11 in evidence. Mr. Morton has testified to it. It was my understanding that \$27,500 was given to us to use for costs in that litigation upon the condition if there was any of it left it would belong to our firm. I think at the end of the year closing entries were made relating to the release of that \$7,769.55 and the amount was closed out into our general funds. That is my understanding. Mr. Lyons is our accountant and looks after those matters.

The \$7,769.55 was reported in the year 1940 for federal income tax purposes. This is the Income Tax Return of Hanna and Morton for 1940. There is a memorandum attached which reads: "The income reported here includes a fee in the amount of \$115,287.74." That refers to the Kern County litigation fee, but the return also includes, as I [111] understand it, the sum of \$7,769.55. I think it is included in Item No. 1, Gross Receipts from Business or Profession. It is not separately shown.

Thereupon, the Income Tax Return of Hanna and Morton for the year 1940 was received in evidence as Respondent's Exhibit G. This exhibit, in so far as material, is as follows:

"GROSS INCOME

1. Gross receipts from business or profession	\$209,087.73
5. Interest on bank deposits, notes, corporation bonds, etc.	52.50
9. Royalties	973.07
<hr/>	
13. Total Income in Items 3 to 12.....	\$210,113.30

(Testimony of Byron C. Hanna.)

DEDUCTIONS

14. Salaries and wages	29,925.30
15. Rent	7,565.00
16. Repairs	220.83
17. Interest on indebtedness	60.68
18. Taxes	1,286.22
21. Depreciation	882.06
23. Other deductions authorized by law	6,917.00
<hr/>	
24. Total Deductions in Items 14 to 23	46,857.09
<hr/>	
25. Ordinary Net Income	\$163,256.21''

“Memorandum. The income reported herein includes a [112] fee in the amount of \$115,287.74 originating as the result of employment contract made in 1932, as to which one of the partners is retiring under the provisions of Section 107.”

There was no further checking with Mr. Lang or any conversation with him regarding the treatment of that last figure of seven thousand odd dollars, to my knowledge. There was no occasion for such under our arrangement. Under our arrangement it belonged to us. We took it over.

It isn't correct that after the agreements, Petitioner's Exhibits 10 and 11, were signed, that the members of our firm could handle the \$30,000 and particularly the \$27,500 in any way we wished as far as the actual handling of the cash was concerned any more so than any other trustee. I assume that any trustee holding trust funds can select the bank where they are to be deposited or possibly the permissible investments under the law in which they may be invested. I did not participate in any of the discussions Mr. Morton testified about that were had with Mr. Lang. I did not personally know of

(Testimony of Byron C. Hanna.)

any arrangements with Mr. Lang to hold any funds in trust for the purposes that were testified about only as I knew through discussions Mr. Morton and I had, and I know that definitely our discussion was that this money was trust money. [113]

The only discussions I know of were those that have been testified to. I do know that this money was paid to us to be utilized for the payment of costs in this case, and the balance, if any, to be our property at the time that the work was completed. I know it was treated as trust funds and regarded as trust funds at all times.

With reference to any other basis of advancing moneys by the Lazard interests in connection with the signing of the agreements, Exhibits 10 and 11, I know Mr. Morton and I discussed two proposals that I recollect. One of the proposals was that we would undertake the litigation on a 50-50 basis and we would advance the costs. Then we discussed the proposal which was finally accepted. We estimated as nearly as we could what the probable cost would be. We concluded if the clients advanced the costs, which we estimated to be \$27,500, that we would take the case on a smaller contingent fee basis. We were particular to see that the amount was as near as we could estimate it adequate to cover the cost of expenditures that might be incurred. But we did not limit our obligation to that amount.

None of these estimates were reduced to writing as far as anticipated costs were concerned. They

(Testimony of Byron C. Hanna.)

were verbal. These agreements were not after October, 1932. The first agreement that bears Mr. Lang's initials, that was initialled at the time we received the \$27,500. [114]

There were \$2,500 received August 19, 1932, for work which was done and completed about the end of August, 1932. Exhibit 10 was the one that was initialled by Mr. Lang and delivered to us at the time we received the \$27,500. The heading immediately preceding the item of \$30,000 relates not to a single paragraph but to a section of the agreement which consists of three paragraphs, Fees and Costs. At that time it was contemplated that this agreement would be sent to France for execution by the various parties. Mr. Lang said rather than have two documents go forward to show his accounting for the \$2,500 and the \$27,500, he would like to have this document recite \$30,000.

Redirect Examination

Referring to Exhibit 2, which is a receipt reading, "Received Lazard Matter the sum of \$27,500.00 on account, trust account.", there is one thing that we are very particular about. When the money is trust money, it is always identified as such. We had a triplicate receipt book that each member of the firm had. Mr. Morton didn't use his. When he would get in money he would simply take the check to the bookkeeper and tell her to write the receipt. In this instance this receipt was written by the bookkeeper. He told her evidently that this \$27,500 was to be

(Testimony of Byron C. Hanna.)

placed in trust, and she noted that on the receipt, which is the carbon copy which she used [115] in making her cash records. The original goes to the client. The first carbon is appended to the deposit slip where the money is deposited in the bank. I assume Mr. Lang got that receipt at that time.

I have my income tax returns for 1932 to 1940, inclusive, and I have the revenue agent's report where examinations have been made. These files contain the income tax returns, copies of the income tax returns of Mrs. Hanna and myself, and reports of revenue agents' examinations for the years 1932 to 1939, inclusive.

Whereupon

EDGAR P. LYONS

was called as a witness by and on behalf of the Petitioner; and having been first duly sworn, was examined, and testified as follows:

Direct Examination

I am a certified public accountant and have been such since 1925, and am practicing here in Los Angeles.

I have been employed by the firm of Hanna and Morton for some years to examine their books of accounts and records, and in the preparation of income tax returns, and also in some cases in resisting the claims of the Federal Government for additional taxes.

(Testimony of Edgar P. Lyons.)

This summary you have given to me was prepared by me from the Lazard trust card and relates to the entries thereon which have to do with the Kern County case. This was prepared from the trust card part of which is in evidence. [116]

Thereupon, upon request, Counsel for Respondent was permitted to cross-examine the witness at this point.

Cross-Examination

With respect to this summary, these are costs for the Kern County litigation, costs incurred year by year for various types of expenses, traveling expenses and various types. The Lazard trust card was very carefully gone over by Mr. Leon B. Brown, who has been referred to, who marked on the card the items with respect to the Kern County case, as well as the items of expense with respect to the other cases which have been commented upon. This distribution, then, for the Kern County case, is made on the basis of Mr. Brown's identification of items. I think there were several items on the same record regarding the Market Street case in San Francisco in a couple of years. There were also expense items, some of them quite numerous, with respect to the Blum case at Portland. They were so identified on the card by Mr. Brown. I did not have anything to do with the keeping of these records contemporaneously during these years 1932 on down through 1940. I just made this summary later. The items under the column, "Firm Withdrawals" are based upon sums paid to Mr. Hanna

(Testimony of Edgar P. Lyons.)

and Mr. Morton and charged to the account. That was the payment of October 15th, I believe it was, 1932, of \$1,000 each. The rest of the items making up the total of \$5,500 are journal transfers, thereby reducing the balance on the [117] on the trust card and transferring these sums into the income account of the firm. They were transferred into the firm's income account, and taken up in income in the years in which entry was made.

Thereupon the summary was received in evidence as Petitioner's Exhibit 12. That exhibit is in words and figures as follows:

"STATEMENT SHOWING CASH RECEIVED, COSTS PAID, FIRM WITHDRAWALS AND BALANCE ANNUALLY 1932 TO 1940, RELATING TO KERN COUNTY CASE IN LAZARD TRUST ACCOUNT

Year	Receipts	Cost Paid	Firm Withdrawals	Balance End
1932	\$27,500	\$ 609.28	\$ 3,500.00	\$23,390.72
1933		972.30	1,000.00	21,418.42
1934		4,559.67		16,858.75
1935		276.18		16,582.57
1936		186.23	1,000.00	15,396.34
1937		5,948.53		9,447.81
1938		1,060.69		8,387.12
1939		606.88		7,780.24
1940		10.69		7,769.55
	<hr/> \$27,500.00	<hr/> \$14,230.45	<hr/> \$ 5,500.00"	

Direct Examination Resumed

Mr. Leon Brown made these designations, I think, in 1940.

At that time Mr. Mackay announced that all of the [118] records of Hanna and Morton are present

(Testimony of Edgar P. Lyons.)

in the court room, and that if there is any desire on the part of Mr. Crouter to go into the original records, they are here.

Thereupon, the Income Tax Return of Byron C. Hanna for the year 1940 was received in evidence as Petitioner's Exhibit 13. That Exhibit 13, in so far as material, contains the following data:

INCOME

2. Dividends— $\frac{1}{2}$ to Spouse	\$ 262.50
6. Income from partnerships, etc.	
Per Schedule	11,992.12
8. Rents and Royalties	715.64
11. Other income	1,748.85
<hr/>	
12. Total Income in Items 1 to 11.....	\$ 14,719.11

DEDUCTIONS

13. Contributions paid	\$ 417.50
14. Interest	622.16
15. Taxes	955.66
18. Other deductions authorized by law	1,104.99
<hr/>	
19. Total Deductions in Items 13 to 18	3,100.31
<hr/>	
20. Net Income	\$ 11,618.80

[119]

Application of Section 107—Lazard Fee

The relevant facts are stated as follows:

(1) Negotiations were started in July 1932 with Etienne Lang, acting for clients. On August 14, 1932 he made payment of \$2,500.

(2) This was accepted by the firm and paid as a fee for preliminary investigation of the case, and on the same day divided by the partners as a fee earned. Prior to verbal contract of acceptance, Mr.

(Testimony of Edgar P. Lyons.)

Lang continued to investigate the firm but was not obligated to consummate the matter. The firm, on the other hand, used the interim to weigh the possibilities of successfully conducting the case.

(3) On October 15, 1932, payment of \$27,500.00 was made by the clients pursuant to the terms of employment contract which was not fully executed until July 1933. However, on that date the terms set forth in the contract were verbally agreed upon.

(4) Contract provisions relative to fees are stated as follows:

“The clients will pay to the attorneys the sum of \$30,000 and a contingent fee based on the amount of all sums or things of value recovered as a result of such suit (or suits) of 15% of the first million dollars recovered and 10% of all sums in excess of one million dollars payable only when and as received by [120] the clients and in the same money or things of value as received by the clients. Of said \$30,000 the attorneys have heretofore been paid \$2,500.00 and the balance of \$27,500.00 will be paid forthwith upon the execution of this agreement.

“The said attorneys agree that in consideration thereof they will bear and pay all expenses and costs of such suit (or suits) including all appeals and hold the clients harmless by reason thereof.”

(5) The case was prepared, litigated, and judgment obtained, which was paid in the year 1940, and the contingent fee collected. During this interim all costs, which were paid by the firm, were charged to the “trust card” or account, on which had been credited the sums received from the client.

(Testimony of Edgar P. Lyons.)

(6) Summary of fees and expenses are shown as follows:

Aug. 14, 1932 Fee	\$2,500.00
Aug. 14, 1932 Taken by partners.....	2,500.00
<hr/>	
Oct. 15, 1932 Contract Payment	\$ 27,500.00
1932 to 1940 Costs, expenses, etc.....	14,230.45
<hr/>	
Balance in Trust.....	\$ 13,269.55
<hr/>	
[121]	
Contingent Fee, Interest, etc. Received in 1940.....	114,018.19
<hr/>	
	\$127,287.74
Less: Fee Participations to other lawyers.....	6,500.00
<hr/>	
Net Fee.....	\$120,787.74
Less: Sums taken from trust account to General Ac- in 1932-3-6 by partners and returned as income....	5,500.00
<hr/>	
Portion Unreported.....	\$115,287.74
<hr/>	

(7) It is the opinion of the taxpayer that:

(a) The original \$2,500 fee was paid and earned in 1932 for preliminary work and is not a part of the fee resulting from the contract (although the employment contract refers to \$30,000 including \$2,500 already paid).

(b) The \$27,500 contract payment of Oct. 15, 1932 was not an earned fee until the completion of the case as the costs deductible therefrom were not and could not have been ascertained even approximately until then.

(8) The question is also raised as to the status of transfers to general account from the trust fund in 1932-3-6 aggregating \$5,500, which were taken by

(Testimony of Edgar P. Lyons.)

the partners as fees earned and returned by them as such. As the partners could [122] not have known the outcome of the litigation, or the costs of possible adverse decisions, new trials, or appeals, the allocations were in fact borrowings by Hanna and Morton general account from trust funds.

(9) Taxpayer believes that his return should be computed under the provisions of Section 107, as fee allocations of \$5,500 are less than 5% of the net fee, and it is so returned, but subject to ultimate determination by the Commissioner as to the correctness of the method employed in determining taxable income. [123]

Thereupon the Income Tax Return of Daisy May Hanna for 1940 was received in evidence as Petitioner's Exhibit 14. Said Exhibit 14, so far as material, contains the following data:

"INCOME		
2. Dividends	\$ 262.50	
6. Income from partnerships, etc.		
Per Schedule	11,992.12	
8. Rents and royalties	275.11	
10. (b) Net long-term gain (or loss) from sale or exchange of capital as- sets	Loss 2,040.01	
12. Total Income in Items 1 to 11.....		\$10,489.72
DEDUCTIONS		
13. Contributions paid	417.50	
14. Interest	622.15	
15. Taxes	955.66	
18. Other deductions authorized by law	1,104.99	
19. Total Deductions in Items 13 to 18		3,100.30
20. Net Income		\$ 7,389.42"

(Testimony of Edgar P. Lyons.)

This Exhibit also contains a memorandum identical with that appended to Exhibit 13, and above set forth.

The witness proceeded with his testimony, as follows: [124]

I made up the income tax returns for Mr. and Mrs. Hanna for 1940. I made it up from the books and accounts of Mr. and Mrs. Hanna and the partnership of Hanna and Morton. I prepared the schedule entitled, "Computation of Additional Tax by Applying Section 107 to Lazard Fee."

That schedule was prepared by examining Mr. Hanna's and Mrs. Hanna's copies of their Federal Income Tax Returns for the years 1933 to 1939, inclusive, and in conjunction therewith examining the letters from the internal revenue agent with respect to those years which have been examined, and the fact that the taxable income changed as a result of that examination.

At this point the following comments were made by Counsel:

"Mr. Mackay: I would like to state for the purpose of the record that we have all the revenue agent's reports for Mr. and Mrs. Hanna that were made during these years, and that they are in court.

Mr. Crouter: If your Honor please, at this stage I arise chiefly to make inquiry as to the line of examination. If it is to establish a foundation for recomputations if and when any opinion is ever rendered in favor of the Petitioners, why this would seem to me that any matter of mere computation

(Testimony of Edgar P. Lyons.)

from prior returns based upon prior acts under [125] Section 107 could be worked out under Rule 50, and the Respondent, of course, will be happy to cooperate in connection with the making of any recomputation if and when that occasion ever arises.

That, as far as I see, there would be no necessity of putting in evidence anything that would normally be worked out under Rule 50.

I just make that observation at this time because I don't know what he has in mind."

Then followed a discussion between Counsel and the Court, which concluded as follows:

"Mr. Mackay: Couldn't we do this, if your Honor please: I fully appreciate—and I don't think there will be any danger—couldn't we leave it this way: If it becomes necessary after the case is decided to take any further evidence in respect to computation, that that could be done?"

The Court: It certainly would have to be done because if we find we have got an open end here when we come to the matter of recomputation, that requires testimony on the merits of the case, aside from the recomputation feature, why we would have to open it up.

If we decide this case, for instance, in [126] accordance with the taxpayers' contention that 107 applies, then we find that we can't close the thing up because we haven't enough in the record as a basis for the computation, then we would certainly have to hold another session and admit such addi-

(Testimony of Edgar P. Lyons.)

tional evidence as will be necessary to complete the job.

Mr. Mackay: I am satisfied with that, your Honor."

The witness proceeded to testify as follows:

I did some work in 1932 for Hanna and Morton in connection with the examination of their income tax returns. I don't think there was any conference on Mr. and Mrs. Hanna's personal returns. There was a conference on the partnership return.

I wrote up for the agent when he was examining the 1932 Hanna and Morton tax returns from June to December, 1932, all the income and expense items and summarized them in such a way that he could check their tax return; and in that connection it was shown him in a conference which we had over my working papers that the \$27,500 was not included in income, but was set up in this trust.

Cross-Examination

I have the summaries that I showed to the agent [127] on that occasion here in the files. The agent was Mr. Kirkpatrick. I understand from the conversation I had with you over the telephone that he is deceased. This page is a detailed summary of the receipts. From June on, 1932, which is the date of the Hanna and Morton partnership. The item you referred to came in October, and it is shown here as a deposit in the Bank of America on the 15th day, and is credited to the column marked "Trusts." That is my handwriting. I have that column headed

(Testimony of Edgar P. Lyons.)

"Trusts" because the daily financial statements from which I wrote this record indicate that it should have been charged or credited to "Trusts," and the cards, the control cards for all the trusts showed it as an entry in the trust card. My working papers showed it at the end of the year as a trust with a balance of \$23,155.02. \$3,500 was included as partnership income and an additional \$2,000, as shown by Exhibit 12, was treated on the record and reported as income, one amount of \$1,000 in 1933 and \$1,000 in 1936. I think probably 1934 was the first year when I prepared the returns.

I did not have any discussions with Mr. Lang regarding any of these affairs at any time. I did not go to any source except the record in connection with the labeling of that item, "Trust, \$27,500.00." I took my summaries from the records as they were presented to me.

I recall having a conference on Mr. Hanna's [128] 1940 income tax return at the agent's office. I recall a conference first with Mr. Fraider. There was a protest at which Mr. Hanna and I attended, and I think Mr. W. E. Wells was the conferee, but I don't remember. We were discussing the merits of this 1940 return and the contention which is under consideration here.

I don't remember conferring with Mr. Wells on it. It seems to me it was Mr. Hawkins we conferred with. I know Mr. Wells and I knew him in 1940. I do not remember conferring with Mr. Wells

(Testimony of Edgar P. Lyons.)

about the matter. I appear before the agents in their office in connection with a number of cases over a period of years. In connection with this particular case of Mr. Hanna, I did not make any notes or memoranda regarding any conference before Mr. Wells.

With respect to the last item shown on Exhibit 12, \$7,769.55, that was included in the 1940 partnership income along with the \$114,000 for the year 1940. The schedule attached to Exhibit G, which shows only \$115,287 was made up of the \$7,700 to which you referred, plus the \$114,000 which has been referred to, and from which, however, has been deducted the \$6,500 also referred to as having been paid to Brown and Dudley. That makes the exact amount. That sum is included in here.

The gross amount received, including the seventy-seven hundred odd dollars and the \$111,000, which was testified [129] about in court, would constitute all of the moneys received from the Lazard litigation in 1940, according to the computations I have made, remembering that we deducted from that total the sums paid to those other lawyers.

Thereupon Counsel for the Respondent called

EDGAR P. LYONS

as a witness for Respondent; and under examination he testified as follows:

(Testimony of Edgar P. Lyons.)

Direct Examination

I know what the sums were received by the firm in connection with the Market Street litigation and the Blum case. They are on those cards, the trust cards. I can tell the total amounts received by Hanna and Morton from any of the clients represented in those cases if I refer to other information. I would have to examine those cards to determine whether the information is available in court. I could give you the information if I had the cards. They are available.

Thereupon the Petitioner rested.

Mr. Lyons, on Direct examination on behalf of the Respondent, proceeded to testify as follows:

I have summaries from the records of Hanna and Morton showing total amounts received by the firm in connection with the so-called Market Street litigation. The Lazard trust cards show on February 8, 1938 they received from the Anglo-California National Bank \$19,032.19 from the [130] Market Street case. The card shows that was received from the Bank, which was one of the defendants. That is the only sum shown by the records as having been received in the Market Street case. On February 8, 1938, a check was drawn to Courtney Moore, attorney in San Francisco, for \$3,100 and charged to that account, and on the same date a check for \$9,516.10 was drawn to Lazard Frere. On the same date a transfer of \$6,000, approximately the balance, was made as a transfer to legal fees received from the trust.

(Testimony of Edgar P. Lyons.)

A total amount of \$19,000 was received by Hanna and Morton and deposited. Lazard Frere was the name of the client. Mr. Moore is an attorney in San Francisco. In connection with this Market Street case, in the years 1937 and 1938, if I remember correctly, there were some \$400 or \$500 worth of expenses in this case marked on the card. That is where the difference comes in.

A card which includes the transactions in the Portland case indicates that on October 13, 1941 there was received and deposited \$43,429.79. And the card shows under date of October 11, 1941, payment made to Courtney L. Moore for \$20,000 and a transfer out of the trust for \$23,429.79 to client's income card. That shows the complete distribution of the forty-three thousand odd dollars as far as the records go.

The Lazard trust card indicates the receipt on [131] June 5, 1940 of \$5,000 in connection with a case known as the bankruptcy case. On the same date a check was written to Courtney L. Moore, the San Francisco attorney, for \$2,500, and the balance, \$2,500, was then transferred to income in 1940.

There are no other records that I know of, or any amounts which were received in connection with any of these Lazard litigations. I am familiar with all their records at this time.

Approved.

(Signed) J. P. WENCHEL. CAR.

[Endorsed]: Filed T.C.U.S. May 19, 1945. [132]

United States Circuit Court of Appeals
for the Ninth Circuit

No. 740

DAISY MAY HANNA,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S STATEMENT OF POINTS TO
BE RELIED ON AND DESIGNATION OF
PARTS OF THE RECORD TO BE
PRINTED

Comes now Daisy May Hanna, the petitioner for review in the above-entitled cause, and states that the points on which she intends to rely in this case are as follows:

1. The Tax Court of the United States erred in finding as a fact or deciding as a matter of law that the withdrawals from the \$27,500 trust fund mentioned in the Findings, amounting to \$5,500, constituted payment of a part of the fee for the services rendered in the employment mentioned in the Findings, to Hanna and Morton when and as received by Hanna and Morton;

2. The Tax Court of the United States erred in finding as a fact or deciding as a matter of law that the withdrawal of accrued interest on the said trust fund, amounting to \$1,168.86, constituted payment of a part of the fee for the services rendered in the

said employment to Hanna and Morton when and as received by Hanna and Morton; and [133]

3. The Tax Court of the United States erred in determining that less than 95% of the fee of Hanna and Morton for services under the employment above mentioned was received in the calendar year 1940.

Petitioner hereby designates the entire record, as certified to the Clerk of the above-entitled Court, as necessary to be printed for the consideration of the points set forth above.

A. CALDER MACKAY and
ADAM Y. BENNION
A. CALDER MACKAY

By ADAM Y. BENNION
Attorneys for Petitioner

Service admitted 5/18/45.

(Signed) J. P. WENCHEL. CAR.

[Endorsed]: Filed T.C.U.S. May 19, 1945. [134]

[Title of Circuit Court of Appeals and Cause.]

PETITIONER'S DESIGNATION OF CON-
TENTS OF RECORD ON REVIEW

Petitioner hereby designates for inclusion in the record on review in the above-entitled proceeding, the following:

The complete record of all the proceedings and evidence taken before The Tax Court of the United States and all matters required by Subdivision (g)

of Rule 75 of the Federal Rules of Civil Procedure; excepting exhibits filed as evidence, but including the statement of evidence in this cause heretofore prepared, served and filed.

Dated: May 4, 1945.

A. CALDER MACKAY and

ADAM Y. BENNION

A. CALDER MACKAY

By ADAM Y. BENNION

Attorneys for Petitioner

Service admitted 5/18/45.

(Signed) J. P. WENCHEL. CAR

[Endorsed]: Filed May 19, 1945. [135]

[Title of Tax Court and Cause.]

CERTIFICATE

I, B. D. GAMBLE, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 135, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 4th day of June, 1945.

[Seal]

B. D. GAMBLE

Clerk, The Tax Court of the
United States.

[Endorsed]: No. 11071. United States Circuit Court of Appeals for the Ninth Circuit. Daisy May Hanna, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcrip of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed June 11, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 740

DAISY MAY HANNA,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ORDER

For cause appearing of record, it is hereby

Ordered: That the time for transmission and delivery of the record on petition for review of the above entitled proceeding in the United States

Circuit Court of Appeals for the Ninth Circuit be
and it is hereby extended to June 22, 1945.

FRANCIS A. GARRECHT,
Judge

Dated May 18, 1945, San Francisco, California.

[Endorsed]: Filed May 18, 1945. Paul P.
O'Brien, Clerk.

A true copy.

Attest: May 18, 1945.

[Seal] (s) PAUL P. O'BRIEN
Clerk.

Now: June 5, 1945, the foregoing order is certified
from the record as a true copy.

[Seal] B. D. GAMBLE
Clerk.

[Endorsed]: Filed T.C.U.S. May 23, 1945.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

No. 11070.

BYRON C. HANNA,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

No. 11071.

DAISY MAY HANNA,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONERS' OPENING BRIEF.

A. CALDER MACKAY and
ADAM Y. BENNION,

728 Pacific Mutual Building, Los Angeles 14,

Attorneys for Petitioners.

FILED

AUG 27 1945

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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

No. 11070.

BYRON C. HANNA,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

No. 11071.

DAISY MAY HANNA,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONERS' OPENING BRIEF.

Preliminary Statement.

The above cases having been consolidated for the purpose of briefing and hearing, this brief is presented on behalf of the Petitioner in each of these cases.

Opinion Below.

The Memorandum Findings of Fact and Opinion of The Tax Court of the United States, entered January 15, 1945 (R. 21-26 in No. 11070 and R. 22-27 in No. 11071), are not reported.

Jurisdiction.

The Commissioner of Internal Revenue, Respondent herein, on November 17, 1942, mailed to each Petitioner a notice of deficiency wherein, so far as is material to these proceedings, the Respondent proposed additional income taxes for the calendar year 1940 in the sum of \$4,134.55 for Byron C. Hanna and in the sum of \$3,476.26 for Daisy May Hanna. (R. 11-16 in No. 11070 and R. 12-16 in No. 11071.) Within the ninety-day period each Petitioner filed a petition with The Tax Court of the United States wherein it was alleged, among other things, that Respondent's action in denying the application of Section 107 of the Internal Revenue Code to a fee received in 1940 by Petitioners as community income for legal services rendered over a period in excess of five years by the firm of Hanna and Morton, of which firm Bryon C. Hanna was a partner, which said action by Respondent gave rise to the asserted deficiencies in tax, was erroneous. The Petitioners prayed the Court to determine that no deficiencies existed for said calendar year 1940. (R. 4-19 in No. 11070 and R. 4-20 in No. 11071.) Issue was duly joined by Respondent's answer in each proceeding. (R. 19-20 in No. 11070 and R. 20-21 in No. 11071.)

Said petitions were filed pursuant to the provisions of Section 272(a) of the Internal Revenue Code.

The proceedings, duly consolidated for hearing and opinion, came on for hearing on April 27 and 28, 1944,

before Hon. Sam B. Hill, Judge of The Tax Court of the United States. (R. 41 in No. 11071.)

Thereafter, on January 15, 1945, the Court entered its Memorandum Findings of Fact and Opinion (R. 21-26 in No. 11070 and R. 22-27 in No. 11071), and on the same day entered decisions that there were deficiencies in income tax for the calendar year 1940 in the sum of \$4,134.55 in the case of Bryon C. Hanna and in the sum of \$3,476.26 in the case of Daisy May Hanna. (R. 26-27 in No. 11070 and R. 28 in No. 11071.)

Each Petitioner, on April 12, 1945, filed a petition for review by this honorable Court with the Clerk of The Tax Court of the United States (R. 27-37 in No. 11070 and R. 29-39 in No. 11071) and on April 13, 1945, served notice thereof on Respondent. (R. 38 in No. 11070 and R. 40 in No. 11071.) A statement of points to be relied upon was served upon Respondent and filed by each Petitioner on May 19, 1945. (R. 40-41 in No. 11070 and R. 122-123 in No. 11071.)

Both petitioners were and are residents of the County of Los Angeles, State of California, and as such filed their respective income tax returns with the Collector of Internal Revenue for the Sixth Collection District of the State of California. (R. 4 and 19 in No. 11070 and R. 4 and 20 in No. 11071.)

The petitions to this honorable Court were filed pursuant to the provisions of Section 1142 of the Internal Revenue Code and jurisdiction is invoked under Section 1141 of said Code.

Questions Involved.

The Tax Court held that Section 107 of the Internal Revenue Code, which is set forth in full hereinafter, could not be invoked by Petitioners. Said section provides a limitation upon the amount of tax attributable to compensation received for personal services rendered over at least a five-year period, where not less than 95 per centum of such compensation is paid only on completion of the services.

The Tax Court decided that the fee hereinabove mentioned was received for services rendered in litigation extending over a period from 1932 to 1940; and that the total fee for these services embraced the following items:

Advances to Hanna and Morton prior to 1940 from a trust fund held by Hanna and Morton for the payment of costs and expenses in connection with the litigation	\$ 5,500.00
Interest on said trust funds which Hanna and Morton were permitted to take conditionally prior to 1940.....	1,168.86
Final fee received by Hanna and Morton in 1940	121,787.74
	<hr/>
Total fee	\$128,456.60

By this computation it appears that in 1940 Hanna and Morton received \$246.03, less than 95% of the total fee, in that year; or, as stated by The Tax Court, only 94.8% of the total fee. Therefore, by this minute margin Petitioners are precluded from claiming the benefit of Section 107, I. R. C.; and accordingly must pay the assessed deficiency taxes above mentioned, aggregating \$7,610.81.

We agree that the advances of \$5,500.00 constituted a part of the total fee; but we contend that these advances did not constitute income to Hanna and Morton until 1940.

We further contend that the interest in the amount of \$1,168.86 did not constitute any part of the fee or compensation for the services rendered, and that the conditional receipt thereof by Hanna and Morton prior to 1940 should be entirely disregarded in considering the application of Section 107, I. R. C.

To summarize: It is the contention of Petitioners that the fee consisted of the amount of \$121,787.74 which The Tax Court states was received by Hanna and Morton in 1940, plus the trust fund advances in the amount of \$5,500.00, the unconditional right to which was obtained by Hanna and Morton in 1940; or a total of \$127,287.74; and that accordingly the Petitioners are properly entitled to receive the benefit of the provisions of Section 107, I. R. C.

The extraordinary conclusion of The Tax Court, by which a stated deficit of $\frac{1}{5}$ of 1% of the total amount of the fee received in 1940 (amounting to \$246.03) is accredited with the effect of depriving Petitioners of a benefit of the value of \$7,610.81 to Petitioners, invites the studious attention of this Honorable Court to the facts involved and to pertinent principles of law.

The evidence on behalf of Petitioners was uncontroverted, and conclusively establishes the facts hereinafter set forth, to wit:

Statement of Facts.

(References are to names of witnesses and to transcript pages.)

1. At all times herein mentioned Byron C. Hanna and Daisy May Hanna were husband and wife, and residents of the State of California. [Hanna, 97.]

2. At all times herein mentioned Harold C. Morton and Byron C. Hanna were attorneys at law, engaged in the practice of law as equal co-partners, under the firm name and style of Hanna and Morton, in the City of Los Angeles, State of California. [Morton, 42; Hanna, 99.]

3. At all times herein mentioned Etienne Lang (hereinafter referred to as "Lang"), was the agent and attorney in fact of numerous members of a family of French citizens, herein referred to as "Lazards" [Morton, 42 and 58.]

4. In July, 1932, Lang, on behalf of Lazards, consulted Morton with regard to a claim of Lazards against the Anglo-California National Bank of San Francisco, Herbert Fleishhacker, its president, and certain other firms and individuals, arising out of certain acts of said Bank and Fleishhacker as the agents of the Lazards in the sale of certain property in California belonging to Lazards. [Morton, 42.]

At that time, Lang, on behalf of Lazards, employed Hanna and Morton for two specific purposes only:

(a) To render an opinion upon the validity of such claim; and

(b) To prepare a specimen form of complaint indicating the type of action that would be brought to recover on such claim. [Morton, 42.]

At that time Lang and Morton agreed that Hanna and Morton would be paid a fee of \$2,500.00 for these particular services. [Morton, 43.]

Subsequently, on August 19, 1932, this sum of \$2,500.00 was paid by Lang to Hanna and Morton. [Morton, 43; Petitioners' Exhibit 1, 43.]

5. It was distinctly understood between Lang and Morton that the \$2,500.00 was in payment of the particular services rendered at that time. There was no obligation on the part of Lang or Lazards to employ Hanna and Morton for any further services, and no obligation on the part of Hanna and Morton to accept any such employment or to render any further services. Lang made it clear to Morton that Lazards might decide not to institute any suit and also if they did decide to institute a suit, they might select other counsel to represent them. [Morton, 54-55 and 59-60.]

6. The services involved in the employment hereinbefore mentioned were completed by the end of August, 1932, at which time a draft of the specimen complaint was delivered to Lang. [Morton, 60.] At that time Lang informed Morton that no definite decision had been made whether to file suit, or if so, whether to employ Hanna and Morton for such purpose. [Morton, 43.]

7. Lang again called upon Morton in October, 1932, and advised Morton that the Lazards had decided to file the suit; that he had investigated Hanna and Morton, and was authorized to employ this firm. [Morton, 43-44.]

8. At that time different bases of compensation for such employment were discussed. Morton told Lang that Hanna and Morton would take the case on a fifty-fifty basis and that Lazards would not be required to advance any money for expenses. [Morton, 62.]

Lang rejected this arrangement and suggested that the best possible estimate of the amount required for expenses be made; that Lazards advance such amount; and in consideration of this, the contingent compensation be substantially reduced. [Morton, 63.]

Finally Morton told Lang that Hanna and Morton would handle the case for a fee of fifteen per cent of the recovery, provided Lazards advanced an amount estimated to be sufficient to defray the costs and expenses of the litigation. [Morton, 44.]

At that time it was estimated that a very substantial amount would be required to defray the costs and expenses of the litigation on account of the necessity of investigating values of property in 1915 and 1917; canvassing long time residents in Kern County having knowledge of oil operations; the expense of taking depositions, including depositions of Lazards in Paris; and the expenses of one or more trips to Paris in that connection. [Morton, 55-56.]

9. Finally, Lang and Morton agreed that the amount of \$27,500.00 should be advanced by Lazards to defray the costs and expenses of the litigation, with the understanding that if any balance should remain at the conclusion of the employment, it would belong to Hanna and Morton. [Morton, 44.]

Lang was insistent that the money be handled in such a manner that it would be used to defray the expenses; and Morton explained to Lang that the money would be treated as trust funds by Hanna and Morton, and told him that he would have access to the record of this trust account at all times. [Morton, 44.]

10. A written contract of employment was prepared by Morton on October 15, 1932. Lang initialed and subscribed his name to a copy of this contract, which is Petitioners' Exhibit 10. [Morton, 52-53.]

Another copy of this contract, which, with an immaterial variation is identical with Exhibit 10, was sent forward for signature by Lazards, and came back some months later. This is Petitioners' Exhibit 11. [Morton, 52-54.]

The provisions of Exhibits 10 and 11, in so far as pertinent to the present case, are as follows:

“FEES AND COSTS.

The clients will pay to the attorneys the sum of Thirty Thousand Dollars (\$30,000.00) and a contingent fee based on the amount of all sums or things of value recovered as a result of such suit (or suits) of 15% of the first million dollars recovered and 10% of all sums in excess of one million dollars, payable only when and as received by the clients and in the same money or things of value as are received by the clients. Of said \$30,000.00 the attorneys have heretofore been paid \$2,500.00, and the balance of \$27,500.00 will be paid forthwith upon the execution of this agreement.

The said attorneys agree that in consideration thereof they will bear and pay all expenses and costs of such suit or suits, including all appeals, and hold the clients harmless by reason thereof.”

11. It will be observed that Exhibits 10 and 11 provide for the payment of \$30,000.00 and recite the previous payment of \$2,500.00. This language was inserted at Lang's request so that the contract would show the total

amount paid by him up to that time in connection with this matter. [Morton, 54; Hanna, 107.] The \$2,500.00 item, however, which refers to the payment on August 19, 1932, had nothing to do with the services to be rendered and which were subsequently rendered under Exhibits 10 and 11. [Morton, 54-55; and 61.]

12. Pursuant to the provisions of Exhibits 10 and 11, on October 15, 1932, Lang paid to Hanna and Morton \$27,500.00. The receipt for this payment is Petitioners' Exhibit 2, and contains the notation that it was received on "Trust acct." [Morton, 45.]

13. At all times herein mentioned Hanna and Morton kept daily financial records, showing receipts and disbursements. Whenever money was received for specific purposes it was designated as a "Trust." Each day a statement was prepared showing cash received and whether it was for trust account or the firm's own funds. The daily statement contained the expenditures for the day, showing whether it was from the firm's own funds or from the trust account, and showing the balance of trust obligations; the balance in the bank; and the net amount which belonged to the firm of Hanna and Morton. [Hanna, 97-98.]

14. The daily financial reports for October 14th, 15th, and 17th, 1932, Petitioners' Exhibit 4, show that on October 14, 1932, the trust fund amounted to \$543.04; that on October 15, 1932, \$27,500.00 was received and placed in trust; and that the balance of the trust fund, after the receipt of this money and payments against the trust fund, was \$26,043.04. [Morton, 47-48.]

15. The amount of \$17,500.00 was entered as a credit to an account entitled "Lazard Matter, Trust Account,"

Petitioners' Exhibit 5 [Morton, 49-50]; and the control trust account ledger sheet, Exhibit 8, showed the receipt of the amount of \$27,500.00 in trust on October 15, 1932. [Morton, 51-52.]

16. The trust funds, including the money in question, were segregated at all times on the books of Hanna and Morton, but the funds were carried in general bank accounts of the firm. [Hanna, 101.] The funds herein referred to were treated as trust funds and regarded as trust funds at all times. [Hanna, 106.]

The amounts kept in the various bank accounts of Hanna and Morton at all times during this period equaled or exceeded the aggregate amount of the balance of their trust accounts. [Hanna, 98.]

Lang had access to the Lazard Matter Trust Account and frequently examined it for the purpose of noting expenditures from these funds and the balance on hand. [Morton, 45, 64, and 66.]

17. At the time the \$27,500.00 was received, Morton told Lang that Hanna and Morton would like to withdraw \$5,000.00 from the trust because they would be expending time, and also incurring expenses in connection with the litigation, which would not appear on the account as charges. Lang agreed at that time that they might each withdraw \$1,000.00 from the account, with the understanding that if it were necessary, this money would be restored to the account. [Morton, 49.]

Accordingly, on the same date a check was issued to Morton for \$1,000.00 and also to Hanna for \$1,000.00; and these withdrawals appear on the daily financial report of October 15, 1932, Petitioners' Exhibit 4, and also on the ledger sheet of the Lazard Matter Trust Account,

Petitioners' Exhibit 5, and on the ledger sheet of the Trust Control Account, Petitioners' Exhibit 8, as debits against the trust account of that day. [Morton, 49-51.]

18. In the latter part of the month of October, 1932, Morton requested Lang to allow Hanna and Morton to withdraw an additional \$1,500.00 from the trust account, and Lang consented to this, also upon the condition that if it became necessary, the moneys withdrawn would be restored to the account. [Morton, 49.] This withdrawal also appears as a debit against the Lazard Matter Trust Account, Petitioners' Exhibit 5, on October 31, 1932. [Morton, 50.]

19. Thereafter, on May 1, 1933, with Lang's consent and upon the same conditions, Hanna and Morton withdrew \$1,000.00 from the account. [Morton, 50.] This withdrawal appears on Exhibit 6, which is a continuation of the Lazard Matter Trust Account. [Morton, 50.]

20. Subsequently, on October 31, 1936, with Lang's consent, and under the same conditions, Hanna and Morton again withdrew an additional amount of \$1,000.00 from the trust account. [Morton, 50.] This withdrawal appears on Petitioners' Exhibit 7, which is a continuation of the Lazard Matter Trust Account. [Morton, 50.]

21. The foregoing advances of Hanna and Morton from the trust account are tabulated as follows:

October 15, 1932.....	\$ 2,000.00
October 31, 1932.....	1,500.00
May 31, 1933.....	1,000.00
October 31, 1936.....	1,000.00
<hr/>	
Total.....	\$ 5,500.00

22. Soon after the \$27,500.00 was received, Hanna and Morton placed \$10,000.00 of these funds in a savings account with the Security-First National Bank of Los Angeles, a transcript of which account was introduced in evidence as Respondent's Exhibit A; and \$10,000.00 in a savings account with the Bank of America National Trust and Savings Association, a transcript of which account was introduced in evidence as Respondent's Exhibit B. [Morton, 67-70.]

Lang was advised of the deposit of this money in these savings accounts, and approved of the idea. [Morton, 71 and 72.]

Interest accrued on these savings accounts in the aggregate amount of \$1,168.86. [Morton, 69-70.] The interest was discussed with Lang, and Lang said that Hanna and Morton could keep the interest if they would put it back if necessary to complete the payment of expenses. [Morton, 71, 72.]

23. The interest was withdrawn as follows:

Year	Security-First National Bank	Bank of America
1934		\$265.93
1935	\$676.68	
1936	\$226.25	

24. The litigation against the Anglo-California National Bank of San Francisco and Herbert Fleishhacker was brought to a successful conclusion, and the judgment was paid on January 19, 1940.

At that time Hanna and Morton received the fifteen per cent contingent fee provided by Exhibits 10 and 11, amounting to \$111,588.84; reimbursement from the defendants for costs expended out of the trust fund, amount-

ing to \$2,429.35; plus the balance in the trust fund, amounting to \$7,769.55; a total of \$121,787.74. [Hanna, 97; Lyons, 119.]

This total amount was included in the Hanna and Morton Partnership Return of Income for the calendar year 1940. [Lyons, 119.]

Byron C. Hanna and Daisy May Hanna, in making their returns of community income, respectively, for the year 1940, each elected to invoke the benefit of Section 107 of the Internal Revenue Code and to spread their respective portions of the Lazard fee over a period of five years, Petitioners' Exhibits 13 and 14. [111 and 115.]

Statement of Points Relied Upon.

1. The Tax Court of the United States erred in finding as a fact or deciding as a matter of law that the withdrawals from the \$27,500.00 trust fund mentioned in the Findings, amounting to \$5,500.00, constituted payment of a part of the fee for the services rendered in the employment mentioned in the Finding, to Hanna and Morton when and as received by Hanna and Morton;

2. The Tax Court of the United States erred in finding as a fact or deciding as a matter of law that the withdrawal of accrued interest on the said trust fund, amounting to \$1,168.86, constituted payment of a part of the fee for the services rendered in the said employment to Hanna and Morton when and as received by Hanna and Morton; and

3. The Tax Court of the United States erred in determining that less than 95% of the fee of Hanna and Morton for services under the employment above mentioned was received in the calendar year 1940.

ARGUMENT.

If the decision of The Tax Court that the conditional advances from the trust fund, aggregating \$5,500.00, and the interest on the trust fund, amounting to \$1,168.86, constituted fees received by Hanna and Morton during the years 1932 through 1936 in connection with the employment in question, be regarded as a finding of fact, it is contrary to the uncontroverted evidence; and therefore such decision may be properly reviewed by this Honorable Court.

If this portion of the decision of The Tax Court be regarded as a conclusion of law, then it is also a proper subject of review by this Honorable Court.

Bogardus v. Commissioner, 302 U. S. 34, 58 S. Ct. 61, 82 L. Ed. 32;

Dobson v. Commissioner, 320 U. S. 489, 64 S. Ct. 239, 88 L. Ed. 248 (88 L. Ed. Adv. Ops. 179);

Commissioner v. Scottish American Investment Co., 89 L. Ed. Adv. Ops. p. 97 (Dec. 4, 1944);

Claridge Apts. Co. v. Commissioner of Internal Revenue, 89 L. Ed. Adv. Ops. 137 (Dec. 4, 1944).

Applicable Law.

Section 107, I. R. C., provides:

"In the case of *compensation (a) received for personal services* rendered by an individual in his individual capacity, or as a member of a partnership, and covering a period of five calendar years or more from the beginning to the completion of such services, (b) paid (or not less than 95 per centum of which is paid) only on completion of such services,

and (c) required to be included in gross income of such individual for any taxable year beginning after December 31, 1938, the tax attributable to such compensation shall not be greater than the aggregate of the taxes attributable to such compensation had it been received in equal portions in each of the years included in such period." (Emphasis supplied.)

Purpose and Intent of Section 107, I. R. C.

By subsequent declaration and amendment, Congress has manifested a liberal attitude and intent in the enactment of this legislation for the purpose of ameliorating the manifest injustice to which it was directed. The Senate Finance Committee, in commenting on Section 220 of the 1939 Act, explained the purpose and intent of this legislation as follows:

"It has been considered a hardship to tax fully the compensation of writers, inventors, and others who work for long periods of time without pay and then receive their full compensation upon the completion of their undertaking. Under existing law, such persons have their income for the whole period aggregated into the final year. This results in two inequities: First, only the deductions, expenses, and credits of the final year are chargeable against the compensation for the full period; second, under our graduated surtax, the taxpayer is subjected to a considerably greater burden because of the aggregation of his compensation."

In decisions applying the provisions of this section, the courts have uniformly manifested a liberal attitude.

In *Keeble v. Commissioner*, 2 T. C. 1249, at page 1252 The Tax Court said, of the above statute:

“* * * The statute is remedial, granting relief to those coming within its terms. A remedial statute should be given a rational, sensible construction and one which will ‘give the relief it was intended to provide.’ *Bonwit Teller & Co. v. United States*, 283 U. S. 258; *F. Harold Johnston, Executor*, 33 B. T. A. 551; *Michel J. A. Berlin*, 1 T. C. 355. ‘Common sense interpretation is the safest rule to follow in the administration of income tax laws,’ *Rhodes v. Commissioner*, 100 Fed. (2d) 966; and ‘a desire for equality among taxpayers is to be attributed to Congress, rather than the reverse,’ *Colgate-Palm Olive-Peet Co.*, 320 U. S. 422. ‘All statutes must be construed in the light of their purpose. A literal reading of them which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and with the legislative purpose.’ *Haggar Co. v. Helvering*, 308 U. S. 389; *Helvering v. New York Trust Co.*, 292 U. S. 455; *Musselman Hub-Brake Co. v. Commissioner*, 139 Fed. (2d) 65 (C. C. A., 6th Cir., Dec. 1, 1943). * * *”

At pages 1253-4, it was further stated:

“One other circumstance has inclined us to the view which we have taken. The section was amended by section 139 of the Revenue Act of 1942. The amendment is not applicable to the compensation received by these petitioners; but it is worthy of note

that it was made to liberalize, rather than to restrict, the application of the principle of taxing income at the rates applicable when earned. In the new act the period from the beginning to the completion of the services is expressed in months rather than in calendar years and the period is reduced—prospectively—to 36 calendar months. Congress recognized that the use of the expression 'calendar year' in the earlier legislation had resulted 'in an inequitable limitation of the scope' of the section and therefore it was eliminated. The new legislation had no effect upon the former and it does not cover the compensation received by these petitioners. It is nevertheless some slight indication that the Congress may not have intended that the term used by it should be applied and interpreted so as to bring about an inequitable result."

In *Slee v. Commissioner*, Docket No. 76, a Memorandum Opinion was rendered by The Tax Court on July 8, 1943. In that case the taxpayer, an officer of one of an affiliated group of companies, received in 1940 compensation in the amount of \$24,000.00 for special services rendered over a period of more than five years, and which compensation was in addition to his regular salary during that period. It was held that he might properly avail himself of the provisions of Section 107, I. R. C.

In *Addition v. Commissioner*, 3 T. C. 427, the Commissioner contended that a member of the liquidating committee of a bank who was paid in 1940 for all services

from the time of his appointment in 1931, could not avail himself of the provisions of Section 107, I. R. C., for the reason that the work to be done by the committee of which he was a member had not been completed.

The Tax Court rejected this contention of the Commissioner, and held that the services for which the compensation was paid had been completed and that therefore the taxpayer was entitled to avail himself of the provisions of this section.

In *Smith v. Commissioner*, 3 T. C. 696, the Commissioner contended that the five year period referred to in Section 107, I. R. C., meant a calendar year extending from January 1st to December 31st, and that therefore the taxpayer could not obtain the benefit of this section under the facts presented in that case.

The Tax Court held that the words "calendar year" did not necessarily mean a year commencing on January 1st and ending on December 31st, and accordingly rejected the contention of the Commissioner and held that the taxpayer might secure the benefit of this section.

In *Slough v. Commissioner*, 147 F. (2d) 836 (C. C. A. 6), the Commissioner contended that ninety-five per cent of the compensation must be paid in one year to entitle the taxpayer to the benefit of Section 107, I. R. C.

The Court rejected this contention and held that the ninety-five per cent of the compensation need not be paid in one year.

In the course of the opinion, at page 837, the Court referred to the report of the Senate Finance Committee, hereinbefore quoted, and the Court said, at page 839:

“It is true that the Supreme Court has said, as contended by the Commissioner, that provisions granting special tax exemptions are to be strictly construed; that exemptions are allowed only as a matter of legislative grace; and that a taxpayer seeking a deduction must show that he comes within the terms of an applicable statute. *Helvering v. Northwest Steel Mills*, 311 U. S. 46, 49, 61 S. Ct. 109, 85 L. Ed. 29; *White v. United States*, 305 U. S. 281, 292, 59 S. Ct. 179, 83 L. Ed. 172; *New Colonial Ice Co. v. Helvering*, 292 U. S. 435, 440, 54 S. Ct. 788, 78 L. Ed. 1348. But it is also true that the Supreme Court has said that a tax law ‘is to be construed liberally in favor of the taxpayers to give the relief it was intended to provide’ (*Bonwit Teller & Co. v. United States*, 283 U. S. 258, 263, 51 S. Ct. 395, 397, 75 L. Ed. 1018); and that ‘if the words [of a tax statute] are doubtful, the doubt must be resolved against the government and in favor of the taxpayer.’ *United States v. Merriam*, 263 U. S. 179, 188, 44 S. Ct. 69, 71, 68 L. Ed. 240, 29 A. L. R. 1547. See to the same effect *Gould v. Gould*, 245 U. S. 151, 153, 38 S. Ct. 53, 62 L. Ed. 211.

In *Colgate-Palmolive-Peet Co. v. United States*, 320 U. S. 422, 425, 429, 64 S. Ct. 227, the statement was made that a desire for equality among taxpayers, rather than the reverse, is to be attributed to Congress. * * *

The \$27,500.00 Received by Hanna and Morton on October 15, 1932, Did Not Become Compensation "Received for Personal Services" Until the Trust Obligations Had Been Discharged, Which Did Not Occur Until January 19, 1940.

As a general rule, the income tax law is concerned only with realized gains and realized losses.

Weiss v. Weiner, 279 U. S. 333, 335, 73 L. Ed. 720, 721;

Lucas v. American Code Co., 280 U. S. 445, 74 L. Ed. 538;

Commissioner v. Darnell, Inc., 60 F. (2d) 82.

An important case, directly in point, and identical in principle with the facts in the present proceeding, is the case of *Taylor v. Commissioner*, 34 B. T. A. 347, 89 F. (2d) 465, 19 A. F. T. R. 378 (C. C. A. 7, March 26, 1937), wherein it appeared that the petitioners and their wives owned all of the stock of Transcontinental Freight Company outstanding in May, 1925. At that time they sold all of such stock to the Baldwin Universal Company. At about the same time, petitioners entered into a contract with Transcontinental Freight Company, whereby the freight company transferred to petitioners United States bonds of the par value of \$145,000.00; and the petitioners agreed to assume and pay all additional income and excess profits taxes ultimately found to be due from the freight company for the years 1917 to 1924, inclusive, excepting unpaid installments of 1924 taxes shown on the original returns of the company; and further agreed to hold the company harmless and indemnify it against all expense for attorneys' fees in connection with the adjustment of such taxes. The freight company re-

linquished all right to receive back any part of the bonds in case the tax liability was settled for less than \$145,000.00. Petitioners, who filed their income tax returns on a cash receipts and disbursements basis, did not report any part of the \$145,000.00 in their incomes for 1925. A Revenue Agent included it, and the petitioners protested its inclusion, and their protest was allowed by the Commissioner. In the final settlement of their tax liabilities for 1925, no part of the \$145,000.00 was included in their income.

Subsequently, the Commissioner, in determining the deficiencies of petitioners for 1929, included the \$145,000.00, less certain expenses paid as attorneys' fees. Each petitioner then claimed that one-half of the \$145,000.00 was income to him in 1925.

Both the Board of Tax Appeals and the Circuit Court of Appeals held that the income was properly assessed to petitioners in 1929. The Board of Tax Appeals said (pp. 349, 350):

“* * * Although the petitioners received the Liberty bonds in 1925, they did not realize a gain of \$145,000.00 in 1925 from the transaction because the transaction was only then beginning, and it was apparent at that time that they would have to make some expenditures which might even exhaust the entire amount which they had received. Until the tax liability was settled and their expenses determined, no one could say whether they had had a gain or a loss. The transaction was incomplete for tax purposes until 1929, when the tax liability which they had agreed to settle was finally settled and their expenses of litigation paid. Then for the first time their gain on the transaction could be computed by deducting their expenditures from their receipts. * * *.”

The Circuit Court of Appeals said (p. 468):

"We conclude that 1925 was not the proper year for the inclusion of value of these bonds. *Stoner v. Commissioner* (C. C. A.) 79 F. 2d 75; *Commissioner v. Cleveland Trinidad Paving Co.* (C. C. A.) 62 F. 2d 85; *Lucas v. American Code Co.*, 280 U. S. 445, 50 S. Ct. 202, 74 L. Ed. 538, 67 A. L. R. 1010; *North American Oil Consol. v. Burnet*, 286 U. S. 417, 52 S. Ct. 613, 76 L. Ed. 1197.

Petitioners' entire argument is based upon the fact that they acquired physical possession of \$145,000 of Liberty Bonds *in 1925*. They seemingly overlook the fact that this was but the first step in a business transaction; that the second step in said transaction was an adjudication and payment of the tax against T. F. Co. When that tax was determined and paid, the transaction was completed. The profit was then certain. This was in 1929."

Applying the principle declared in the foregoing authorities, it is obvious that when the sum of \$27,500.00 was paid to Hanna and Morton in October, 1932, this was but the first step in a business transaction. The second step in the transaction was to ascertain the amount of money to be expended for costs by Hanna and Morton. This could not be ascertained until the conclusion of the employment, in 1940. Then and then only could it be determined that any part of the \$27,500.00 was to assume the character of compensation. When the litigation was concluded, and the amount of expenditures for costs was definitely known, then and then only, the transaction was completed. At that time, and not until that time, the profit or compensation was certain. That was in 1940.

Another important case is that of *Stoner v. Commissioner*, 79 F. (2d) 75 (C. C. A. 3), in which it appears that Stoner sold certain stock and agreed to deposit, and did deposit, \$50,000.00 of the purchase price, and maintained the same on deposit for the term of two years to meet certain obligations specified in the contract of sale. No part of the money was used for such purpose, and at the end of the two year period, on June 1, 1931, the \$50,000.00 was withdrawn from this special deposit.

The Court held that the taxpayer's share of this fund was not income to the taxpayer for the year 1929, in which it was received and in which the deposit was made, but was income in the year 1931 in which it was withdrawn. The Court said, at page 76:

"Generally speaking, the Income Tax Law is concerned only with realized gains. *Lucas v. American Code Company*, *supra*. There was no receipt of his share of the fund by the taxpayer in 1929 as realized gain. He was acting in a fiduciary capacity for the group of shareholders in the Suburban Company, among whom he himself was one. He received the purchase price in that capacity and under the terms of the contract whereby it was received, he agreed as 'Seller,' to deduct the \$50,000 fund, deposit it in a special account, and maintain it intact for two years except for such withdrawals as were necessary to carry out the purposes of indemnification. Thus, Stoner, as an individual taxpayer, did not receive his share of the fund until 1931, or have any right to it, any more than the several other shareholders of the Suburban Company represented by him. There could be no realized gain in the fund by any of the shareholders until 1931 * * *."

In the case of *Preston v. Commissioner*, 35 U. S. B. T. A. 312, it appears that two attorneys performed services for clients and received a check in payment therefor payable to the order of both; that they could not agree to the amount to which each was entitled; and the check was deposited in a bank to the joint account of both, and there was drawn from the joint account during the taxable year such amount only as each conceded the other entitled to, the balance being held to be drawn upon on settlement of the differences between them.

It was held that each attorney was required to report as income only the cash withdrawn for his separate use during the year. The Board of Tax Appeals said, at page 321:

"In the last named case, and in numerous others cited by the respondent, the Board has held that where a taxpayer actually received money or property under a claim of right the taxpayer is liable to income tax upon the amounts received even though at a later date a portion of the money had to be refunded. Those cases are, however, distinguishable from the one at bar. The facts in this case are clear that Preston did not have the use and enjoyment in 1930 of any portion of the check received and made payable to Preston and Peck except to the amount of \$100,000 * * *."

Applying the same reasoning to the case at bar, it must be acknowledged that Hanna and Morton did not have the use or enjoyment of any part of the sum of \$27,500.00 paid on October 15, 1932, except possibly \$5,500.00 withdrawn therefrom with the consent of the client, until

January 19, 1940. Even as to this latter amount they were under obligation to replace it should the expenses exceed the amount retained in the trust.

Another important case in point is *Madigan v. Commissioner*, 43 B. T. A. 549. In that case it appears that a football coach was employed for a fixed salary plus a percentage of certain receipts which could not be determined until an accounting in the following year. In the tax year he received a check from his employer with the express understanding that he hold the amount in trust until after the accounting for the tax year could be completed.

It was held that the petitioner was not required to report the check so received as income in the tax year. In the course of the decision, the Board of Tax Appeals said, at page 551:

"* * * No one could tell until after the 1936 accounting whether petitioner would be entitled to any commission for the season, and certainly not what the amount, if any, would be. Prior to the accounting determination of the amount, petitioner had and claimed no right to use or enjoy any of the check except the amount of his 1934 and 1935 commissions which had been fixed and determined. This much he returned for tax in his 1936 income. The Commissioner was in error in adding any additional amount of the Fordham check. *Sara R. Preston*, 35 B. T. A. 312; *cf. North American Oil Consolidated v. Burnet*, 286 U. S. 417; *Doyle v. Commissioner*, 110 Fed. (2d) 157; certiorari denied, 311 U. S. 658; *Commissioner v. Alamitos Land Co.*, 112 Fed. (2d) 648."

Advances From the Trust Funds Were Not Compensation "Received for Personal Services."

The undisputed evidence discloses that the advances from the trust funds, aggregating \$5,500.00, were loans which Hanna and Morton were under the obligation of returning to the trust fund if and when occasion arose.

Compensation "received for personal services," in the ordinary use of the terminology, means something paid unconditionally as a salary or wage or fee for personal services rendered.

These advances were not of this character. It is plain from the choice of the language used by Congress, "compensation received for personal services", that it was not intended or contemplated that conditional advances of this type should be classified as compensation, and that the acceptance thereof should deprive the taxpayer of the benefit of the undisputed purpose and intent of this legislation.

These advances do not come within the letter of the statute. Even if they did, they are not within the intent of the statute. Facts which, although within the letter of the statute are not within the intent or purpose of the legislation, should not be treated as subject to the statute.

In *Knight Newspapers v. Commissioner*, 143 F. (2d) 1007 (C. C. A. 6), the Court had occasion to consider the question as to whether certain income received by a corporation subject to a contingent obligation to repay the same, should be classified as income of the corporation within the terms of the Personal Holding Companies Act. The Court said, at page 1009:

"Since the decision in *North American Oil Consolidated v. Burnet*, 286 U. S. 417, 424, 52 S. Ct.

613, 615, 76 L. Ed. 1197, it has been thought to be the rule that 'if a taxpayer receives earnings under a claim of right without restriction as to its disposition, he has received income which he is required to return (for tax purposes), even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent' * * *."

After discussing additional cases involving the same principle, the Court further said, at page 1010:

"The cases cited, however, deal with the incidence of the general income tax, and it has been pointed out that no great injustice results in regarding tentative or contingent gains as income when received, since, if repayment is subsequently required, allowable deductions in a later year would roughly recompense the taxpayer for the tax paid in an earlier year. Here, however, a surtax of some 65 to 75% is involved, and this cannot be recovered by a deduction for loss claimed in a subsequent year, since tax saving would then be limited by application only of the normal income tax rate. The personal holding company surtax is not, it is urged, a true tax, but a penalty. Its purpose is to force distribution of profits by a corporation so that they will be subject to taxation as income of shareholders. This has been noted in many cases, including General Securities Co. v. Commissioner, 10 Cir., 123 F. 2d 192; Pembroke Realty & Securities Corp. v. Commissioner, 2 Cir., 122 F. 2d 252. So, it is insisted, the rule of the Burnet case is not applicable, and even if the statute covers such income, it certainly was not within the intention of the Congress to treat contingent gains as income subjecting a holding company, not organized for tax evasion purposes, to the severe penalties

of the Act. Administrative necessity does not require such onerous result. *It is within the power of the court to declare a thing which is within the letter of the statute, not governed by the statute, because not within its spirit or the intention of its makers.* Pembroke Realty & Securities Co. v. Commissioner, *supra*; Holy Trinity Church v. United States, 143 U. S. 457, 12 S. Ct. 511, 36 L. Ed. 226; Gregory v. Helvering, 293 U. S. 465, 55 S. Ct. 266, 79 L. Ed. 596, 97 A. L. R. 1355." (Emphasis supplied.)

The Sum of \$1,168.86, Interest on the Savings Accounts, Did Not Constitute Compensation "Received for Personal Services."

The interest received on the savings bank accounts clearly was not compensation "received for personal services" within the intent, purpose or language of Section 107, I. R. C. The interest is broadly distinguished from the character of compensation described in this section, for it was not any part of the compensation contracted to be paid for the services to be rendered.

The compensation for the personal services rendered in the employment in question was definitely fixed by the terms of the written contract of which Exhibits 10 and 11 are copies. It was definitely limited to a contingent fee of a percentage of the amount of the recovery, plus the balance, if any, which might remain in the trust fund. The interest was no part of that compensation.

If the receipt or retention of this interest by Hanna and Morton had been challenged, they could not have defended the right to receive or retain this interest in any court in the land on the theory that it constituted compen-

sation or a part of the compensation for the services rendered in this litigation. They had entered into contracts [Exhibits 10 and 11], definitely fixing the compensation they were to receive for rendering these services. Any payment in addition to that for which they had thus contracted would have been purely gratuitous as a matter of law.

The word "compensation" as used in Section 107, I. R. C., is legally equivalent to "consideration." It is elementary that where parties have agreed to perform services for a definitely specified consideration, any additional inducement to the parties to perform the services, whether by payment of money or otherwise, is wholly gratuitous.

The permission given to Hanna and Morton to receive this interest was in the nature of a loan at the time of the transactions, for it was subject to the obligation of repayment if it became necessary for the payment of costs and expenses.

When the case was finally concluded in 1940 and that possibility no longer existed, the interest became a gratuity from the Lazards to Hanna and Morton.

If it were necessary to be so specific, it might be logically argued that the interest was an emolument or an honorarium. The purposes of this case do not require that the interest be characterized with perfect exactitude. This much is certain. Upon the facts and under the law, it was not "compensation received for personal services."

In cases where the courts have had occasion to consider whether such incidental financial benefits were to be classified as compensation, it has been uniformly held that they are not to be so classified. Thus, it has been held that the word "emoluments" has a broader meaning than the

word "fees," which are defined as a reward or wages given to one as a recompense for his labor and trouble for the execution of his office or profession. *State v. Dishman*, 334 Mo. 874, 68 S. W. (2d) 797, 798.

Likewise, it has been uniformly ruled that commutations, allowances for quarters, lump sum subsistence allowances, lump sum allowances for uniforms and equipment and lump sum allowances for traveling expenses made to officers of the armed forces do not constitute income. (See Regulations 111, Sec. 29.22(a)-3, par. 7704, Prentice-Hall Service, 1945; also various bulletins listed in par. 7730, Prentice Hall-Service, 1945; also, *Jones v. United States*, 60 Ct. Cl. 552, 5 A. F. T. R. 5297, and *Sherburne's Case*, 16 Ct. Cl. 491.)

In *United States v. Smith*, 158 U. S. 346, at p. 348, 39 L. ed. 1011, at p. 1012, the Court said:

"* * * The allowance of mileage to officers of the United States, particularly in the military and naval service, when traveling in the service of the government, is fixed at an arbitrary sum, not only on account of the difficulty of auditing the petty items which constitute the bulk of traveling expenses, but for the reason that officers travel in different styles, and expenses, which in one case might seem entirely reasonable, might in another be deemed to be unreasonable. There are different standards of traveling as of living, and while the mileage in one case may more than cover the actual expenses, in another it may fall short of it. It would be obviously unjust to allow one officer a certain sum for traveling from New York to Chicago, and another double that sum, and yet their actual expenses may differ as widely as that. *The object of the statute is to fix a certain allowance, out of which the officer may make a saving*

*or not as he chooses, or is able. And while, in some cases, it may operate as a compensation, it is not so intended, and is not a fee, charge, or emolument of his office within the meaning of section 834 * * *.*" (Emphasis supplied.)

Thus, it has been held that the appropriation of a lump sum to defray the personal expenses of a public official does not constitute additional compensation to the public official.

State v. Yelle, 7 Wash. (2d) 443, 110 P. (2d) 162;

Kirkwood v. Soto, 87 Cal. 394, 25 Pac. 488;

Milwaukee County v. Halsey, 149 Wis. 82, 136 N. W. 139;

Cummings v. Smith, 368 Ill. 94, 13 N. E. (2d) 69;

McCoy v. Handlin, 35 S. D. 487, 153 N. W. 361, L. R. A. 1915E, 858, Ann. Cas. 1917A, 1046;

Macon County v. Williams, 284 Mo. 447, 224 S. W. 835;

State v. Reeves, 44 S. D. 568, 184 N. W. 993;

Smith v. Jackson, 241 Fed. 747 (C. C. A. 5); 246 U. S. 388, 38 S. Ct. 353, 62 L. ed. 788.

This principle has been extended to appropriations providing for the entertainment of public officials and for wines, liquors and cigars furnished to public officials. *Russ v. Commonwealth*, 210 Pa. 544, 60 Atl. 169, 105 A. S. R. 825.

It has been held that a residence furnished to a sheriff is not a part of his compensation within the terms of the Corrupt Practices Act. *Kommers v. Palagi*, 111 Mont. 293, 108 P. (2d) 208.

In *Morrow v. Orshel Bros. Truck Lines*, 235 Mo. App. 1166, 151 S. W. (2d) 138, it was held that the act of an employer in allowing an employee the gratuitous use of the employer's automobile for the employee's own convenience, was a gratuity and did not constitute a part of the compensation of the employee. The Court said:

"The Commission found that claimant's annual salary did not exceed the sum of \$3600. Claimant testified that his salary was \$3600 per year, but on cross-examination he said that he was furnished the automobile not only in connection with the business, but that he was permitted to use it for his own convenience. There is nothing in the evidence to show that the employer could not have withdrawn that use at any time it saw fit, and that its use was anything more than a gratuity extended by the employer to the employee, which could have been terminated at any time. If it was such it could not be considered as any part of his compensation. See *Russell v. Ely & Walker Dry Goods Co.*, 332 Mo. 645, 60 S. W. 2d 44, 87 A. L. R. 953. * * *."

It has been held that interest collected by a United States District Court Clerk on funds in his custody, is not a part of the emoluments of his office.

United States v. MacMillan, 209 Fed. 266 (D. C. N. D. Ill., E. D.);

United States v. MacMillan, 251 Fed. 55 (C. C. A. 7);

United States v. MacMillan, 253 U. S. 195, 40 S. Ct. 540, 64 L. ed. 857.

In *Bogardus v. Commissioner*, 302 U. S. 34, 58 S. Ct. 61, 82 L. ed. 32, it was held that sums of money paid by a corporation, which had been formed by the stockholders of another corporation, to acquire certain assets of such other corporation, in contemplation of the sale of its entire stock to a third corporation; to employees, former employees, and a relative of a deceased employee of the second corporation, in recognition of the loyal support which had helped to make the undertaking a success; are gifts, although designated as an "honorarium" and as a "bonus * * * in recognition of the valuable and loyal services."

In the course of its decision, the Supreme Court said, 302 U. S. 34, 42; 82 L. ed. 32, 38:

"Because the Unopco stockholders had benefited by the past services of the recipients, it by no means follows that the distribution in question was not a gratuity. It nowhere appears in the record that full compensation had not been made for these services. There would seem to be a natural inference to the contrary; and the inference is made determinate by the stipulated fact that no one was under any obligation, legal or otherwise (and this would include a moral obligation, however slight) 'to pay any additional compensation.' There is no ground for saying that the benefit received and the compensation then paid for it were not equivalents."

In *Siegel v. Commissioner*, 39 B. T. A. 60, it appeared that a law firm had rendered certain services in connection with the acquisition by a client of a large block of stock in a corporation. The law firm was paid \$50,000.00 for its services, and was given an option to acquire 5,000

shares of the stock involved in the transaction at an advantageous price.

It was claimed by the Commissioner that the option to purchase this stock at such price was additional compensation to the law firm. The Board of Tax Appeals held that this was not correct, stating, at page 66:

"Testing the facts of record by the criteria thus laid down, it is clear that the transfer of the option was in every sense a gift. It was so specifically characterized by both parties. Compensation in the full amount agreed on had been paid. It came as a surprise to petitioner and was conceived and suggested by the donor. On receipt by petitioner it was gratuitously apportioned by him among certain of his associates but not in the ratio of participation and ownership in the firm business. The only premises on which respondent's case is based are the fact that the relationship of attorney and client had existed, the coincidence in time with the payment of fees, and the further fact that the assignment was inspired by appreciation of valuable services rendered. But the Supreme Court has indicated clearly that these circumstances are not sufficient to defeat a gift if in fact a gift is intended and carried out."

In the recent case of *McDermott v. Commissioner*, F. (2d) (June 18, 1945), the United States Court of Appeals for the District of Columbia reversed The Tax Court's determination that the Ross Essay Prize awarded by the American Bar Association constituted taxable income to the recipient, holding that the award was not paid for services rendered but was a gift.

In *Chase v. Commissioner*, 19 B. T. A. 1040, it appeared that petitioner was the sister of George Chase.

who had been Dean of the New York Law School, and to whom the said school was indebted at the time of his death in the amount of approximately \$29,000.00. This indebtedness represented a balance on an account which had run over a period of 10 years. After the death of George Chase, the New York Law School paid a substantial amount to the petitioner as interest on this debt.

The Board of Tax Appeals held that this was a gift, and did not represent income to the petitioner; basing its decision upon the fact that there was no obligation to pay interest, and in any event that the petitioner was not entitled to the payment of any interest.

In *Jones v. Commissioner*, 31 F. (2d) 755 (C. C. A. 3), it was held that where upon the sale of stock in two affiliated corporations by their stockholders, the stockholders deposited \$300,000.00 to be distributed to the administrative staff of the two corporations, such payment was a gift, and not compensation.

The Court held that it constituted a gratuitous payment by the stockholders "in recognition of the past faithful work of the staff," and that the payment was made without obligation or any consideration then or theretofore received or rendered to the stockholders.

The Commissioner has ruled that railroad transportation passes issued to employees and their families, to be used when not engaged on business of the company, are to be considered as gifts, and not income. O. D. 946—C. B. June, 1921, p. 110, 1945 Prentice-Hall Service, par. 8676.

In the case of *Rose, Etc. v. Trust Company of Georgia*, 28 F. (2d) 767 (C. C. A. 5), it appeared that the Trust Company of Georgia was a member of a syndicate for the

purpose of reorganizing the Coca Cola Company of Georgia. The syndicate agreed to purchase 83,000 shares of the common stock at \$5.00 per share and to underwrite 417,000 shares of common stock for sale to the public at \$35.00 per share. The Trust Company of Georgia received 13,677 shares of common stock at \$5.00 per share as a result of this transaction.

The Commissioner contended that the difference between the \$5.00 per share paid and the market value of the stock, approximately \$40.00 per share, constituted compensation to the Trust Company of Georgia for which it was liable for the payment of income tax.

The Court denied this contention, saying, at page 768:

“Conceding that compensation for personal services may be paid in property, instead of in money, and that income taxes may be assessed on the value of the property, we agree with the District Court that the transaction here in question was a purchase in good faith. In such case no taxable income would be derived until the disposal of the stock, except, of course, that arising from dividends. *Eisner v. Macomber*, 252 U. S. 189, 40 S. Ct. 189, 64 L. ed. 521, 9 A. L. R. 1570; *McCaughn v. Ludington*, 268 U. S. 106, 45 S. Ct. 423, 69 L. Ed. 868.”

It has been uniformly held that where the driver of an automobile is accompanied by another individual, and the trip is made for pleasure, social or entertainment purposes, and the accompanying individual shares the cost of gasoline and oil or cost of operating the automobile on the trip, such sharing is an exchange of social amenities, and does not transform the individual from a guest into a paying passenger under statutes defining guest as a person

who accepted a ride without giving "compensation" therefor.

McCann v. Hoffman, 9 Cal. (2d) 279;

Rogers v. Vreeland, 16 Cal. (2d) 364;

Starkweather v. Hession, 23 Cal. App. (2d) 336;

Stephen v. Spaulding, 32 Cal. App. (2d) 326.

It is to be noted that the association between Lang and Morton over the period when this litigation was pending, from 1932 to 1940, was close and intimate. Morton testified that Lang was working on the case almost constantly except for a period of one year when he was in France. [64.] He testified that Mr. Lang watched the trust funds like a hawk. [68.]

These are but fragmentary revelations from which, as well as from the magnitude and nature of the litigation, the close and intimate association between Lang and Morton may be properly inferred.

It is not an uncommon experience for clients having such a long, continued association with a lawyer in regard to a matter of such importance, to present the lawyer with gifts or gratuities of one type or another from time to time, and for the lawyers to reciprocate. This is but a natural consequence of the friendship and of the social and professional relation which develops under such circumstances.

The items of interest were small and inconsequential compared with the magnitude of the work involved and the various factors, both financial and otherwise, represented by that work. It is inconceivable that so small a sum would have been paid or received as additional com-

pensation for an employment of this magnitude. It is much more reasonable and normal to infer that the interest was regarded as an inconsequential incident which Lang gratuitously permitted Hanna and Morton to take under the conditions set forth.

In addition to the foregoing, it is important to observe that interest is in reality a type of income separate and distinct from salaries, wages or compensation for personal services; and it is so recognized in the statute and by the regulations. (See Section 22, I. R. C., and Sec. 29-22(a)-1, Reg. 111).)

It is utterly inconceivable, in view of the spirit and purpose of this legislation, that Congress should have intended that the receipt of such a comparatively inconsequential amount of interest, under the circumstances here present, should deprive a taxpayer of the right to claim the benefit of this remedial legislation.

Conclusion.

As hereinbefore noted, the Petitioners are denied the benefit of Section 107, I. R. C., because the firm of Hanna and Morton in 1940 received \$246.03, or $\frac{1}{5}$ of 1%, less than 95% of the total fee.

The denial of this benefit to Petitioners would impose a shockingly heavy penalty upon Petitioners and subject them to additional tax liability aggregating \$7,610.81.

The amount of this additional liability is so large, as compared with the relatively insubstantial and inconse-

quential amount of the deficit of \$246.03, as to shock one's sense of fairness and justice. The results projected do great violence to the purpose and intent of Congress in enacting this legislation, and illustrate the serious consequences which may attend a too literal application of the law without regard to the spirit and purpose of the legislation. A thief who stole \$246.03 would hardly be subjected to so severe a financial penalty.

Moreover, this result is achieved by treating as income amounts received prior to 1940 which were not definitely invested with the character of income at the time and could not be known to be income with certainty until 1940.

Additionally, some of these amounts, the interest items, did not constitute any part of the contracted compensation. They were, in a legal sense, purely gratuitous; and in a factual sense they were not treated by the parties as compensation, but were actually in the nature of gratuities.

There must be some sense of proportion in the administration of the law. It seems out of keeping with any sense of proportion to proceed by the theories applied in this case to classify as income "received for personal services" prior to 1940 items such as the advances from trust funds and the interest items; and thus to create the premise for holding that the income received in 1940 was \$246.03 less than the amount required to entitle Petitioners to the benefit of Section 107, I. R. C., thereby sustaining a tax deficit of \$7,610.81.

We respectfully urge:

(1) That the advances from the trust fund did not constitute compensation "received for personal services" prior to 1940;

(2) That the interest did not constitute such compensation received prior to 1940; and

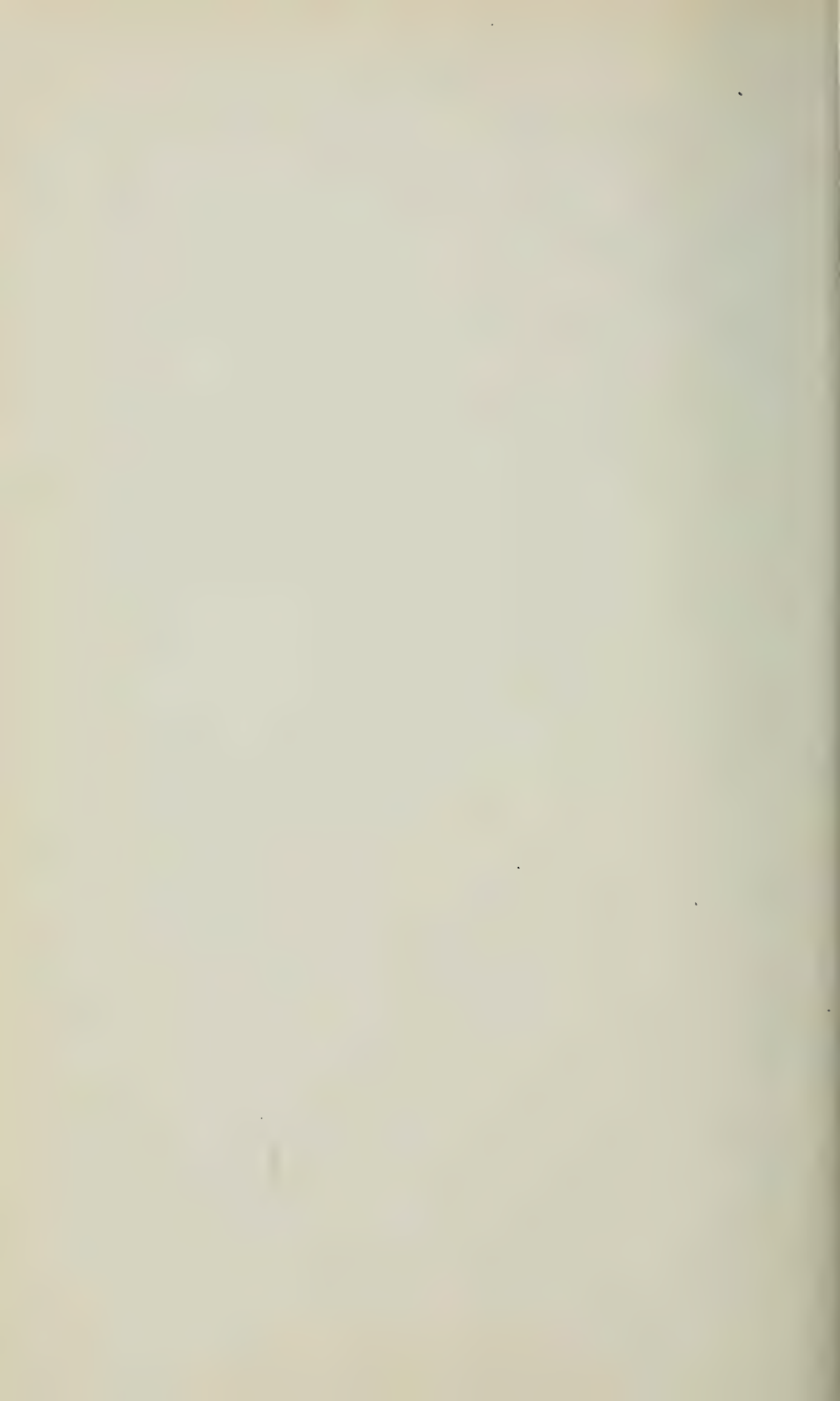
(3) That in any event, if it be finally determined that the income received in 1940 was \$246.03 less than that which would entitle Petitioners to the benefit of Section 107, I. R. C., this deficit is so insubstantial and inconsequential that the *de minimis* rule should be applied, and the Petitioners given the benefit of this section.

Respectfully submitted,

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Attorneys for Petitioners.



Nos. 11070, 11071

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

BYRON C. HANNA, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

DAISY MAY HANNA, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX
COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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FILED

SEP 26 1941

PAUL P. O'BRIEN.

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**In the United States Court of Appeals
for the Ninth District**

No. 11070

BYRON C. HANNA, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

No. 11071

DAISY MAY HANNA, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITIONS FOR REVIEW OF THE DECISIONS OF
THE TAX COURT OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

OPINION BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 22-27)¹ are unreported.

JURISDICTION

These consolidated petitions for review involve income tax deficiencies for 1940 determined against Byron C.

¹ All record references, unless otherwise indicated, are to the complete record in No. 11071.

Hanna and his wife Daisy May Hanna. Deficiency notices were mailed to the taxpayers on November 17, 1942 (No. 11070, R. 11-16; No. 11071, R. 12-16). Within 90 days thereafter, on February 10, 1943, the taxpayers filed petitions with the Tax Court for redetermination of the deficiencies, under the provisions of Section 272 of the Internal Revenue Code (R. 1, both dockets). The Tax Court entered its decisions on January 15, 1945, ordering and deciding that there are deficiencies in income tax in the amount of \$4,134.55 against Byron C. Hanna (No. 11070, R. 26-27) and in the amount of \$3,476.26 against Daisy May Hanna (No. 11071, R. 28). Petitions for review by this Court were filed on April 12, 1945, pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code (No. 11070, R. 27-32; No. 11071, R. 29-34).

QUESTION PRESENTED

Whether the Tax Court erred in finding that less than 95 percent of the compensation for services rendered by a partnership of which one of the taxpayers was a member was paid on completion of the services and in holding, for that reason, that the taxpayers could not avail themselves of the method of computing the tax provided by Section 107, Internal Revenue Code.

STATUTE INVOLVED

Revenue Act of 1939, c. 247, 53 Stat. 862:

SEC. 220. *Compensation for Services Rendered for a Period of Five Years or More.*

(a) The Internal Revenue Code is amended by inserting after section 106 the following new section:

"SEC. 107. *Compensation for Services Rendered for a Period of Five Years or More.*

"In the case of compensation (a) received, for personal services rendered by an individual in his individual capacity, or as a member of a partnership, and covering a period of five calendar years or more from the beginning to the completion of such services, (b) paid (or not less than 95 per centum of which is paid) only on completion of such services, and (c) required to be included in gross income of such individual for any taxable year beginning after December 31, 1938, the tax attributable to such compensation shall not be greater than the aggregate of the taxes attributable to such compensation had it been received in equal portions in each of the years included in such period."

(b) The amendment made by subsection (a) shall be applicable to taxable years beginning after December 31, 1938.

(26 U. S. C. 1940 ed., Sec. 107.)

STATEMENT

The Tax Court found the following facts (R. 23-26):

Byron C. Hanna and Daisy May Hanna, the taxpayers, were husband and wife, residents of California during 1940 and all other times herein mentioned. They filed individual income tax returns for that year on the community property basis with the Collector of Internal Revenue for the Sixth Collection District of California. During the taxable year and all other years herein mentioned Byron C. Hanna and Harold C. Morton were law partners known by the firm name of Hanna and Morton. (R. 23.)

In July 1932, Etienne Lang, as agent for the members of a Lazard family of France, consulted Hanna and Morton with reference to claims against the Anglo-California National Bank of San Francisco, Herbert Fleishhacker, its president, and others. These claims

arose out of certain acts of the Bank and Fleishhacker as agents of the Lazards in the sale some 17 years earlier of lands in California belonging to the Lazards. At that time Lang employed Hanna and Morton to render an opinion on the validity of the claims and to draft a specimen form of complaint. Lang paid Hanna and Morton \$2,500 for these services. There was no obligation on the part of Lang or the Lazards to employ Hanna and Morton for further services and no obligation on the part of Hanna and Morton to accept such employment. (R. 23.)

In October 1932, after consulting with other lawyers, Lang employed Hanna and Morton to proceed with the case. Lang and Morton agreed that \$27,500 would be advanced to Hanna and Morton to cover costs and expenses, with the understanding that if any balance should remain at the conclusion of the employment, it would belong to Hanna and Morton. It was understood that Hanna and Morton received these funds for such purposes only and the accounts of Hanna and Morton dealing with the funds were frequently inspected by Lang. The books of Hanna and Morton designated the fund as a "Trust Account." The \$27,500 was paid over on October 15, 1932, and the receipt given for it read "Lazard Matter, On Account, Trust Acct." It was further agreed that Hanna and Morton would be responsible for any expenses beyond the \$27,500. In addition to any balance remaining of the \$27,500 their fee was to be 15 per cent of the recovery. (R. 23-24.)

For some time, \$20,000 of the fund was left on deposit in the firm's name in two savings banks. Lang knew and approved of this. The funds were never kept in a

separately designated trust account. Lang knew of this and acquiesced in it. (R. 24.)

A total of \$1,168.86 in interest accrued on the savings accounts. During the years 1934 to 1936, Hanna and Morton withdrew this interest for their own unrestricted use having been told by Lang that they could keep it. They were to return it if it ever became necessary to complete the payment of expenses, their obligation in any event being to meet all expenses over the \$27,500. The interest so received was currently reported as income by Hanna and Morton. This interest was a fee for services when it was so withdrawn by Hanna and Morton. (R. 24-25.)

Lang agreed to the withdrawal of \$2,000 by Hanna and Morton as fees at the time the \$27,500 was first paid over in October 1932. Later in the same month an additional \$1,500 was withdrawn as a fee with Lang's approval. A further fee withdrawal of \$1,000 was made on May 1, 1933, with Lang's permission and again on October 31, 1936, Lang gave Morton his consent for the firm to withdraw \$1,000. Each of these fees was paid subject to the understanding that Hanna and Morton were to make up any deficits for expenses beyond the original amount paid to them for that purpose. They included these fees as compensation in their income tax returns in the years received. (R. 25.)

Hanna and Morton successfully tried the case for the Lazards and on January 19, 1940, the Bank paid \$746,354.95 in satisfaction of the judgment. From this amount Hanna and Morton received on that day \$114,018.19, consisting of the contingent fee in the amount of \$111,588.84 and \$2,429.35 reimbursement of costs expended

from the \$27,500 fund. At that time, exclusive of the reimbursement for costs, there was a balance of \$7,769.55 of the original \$27,500 which Hanna and Morton also received pursuant to the arrangement previously made. Thus, Hanna and Morton received fees of \$1,168.86 and \$5,500 prior to completion of the services in 1940 and \$121,787.74 on completion of these services in 1940. (R. 25.)

Viewing the original payment of \$2,500 as being for a separate and distinct employment, addition of these figures indicates that a total fee of \$128,456.60 was received by Hanna and Morton on this case. Of this amount, \$121,787.74, or 94.8 percent, was paid on the completion of the services. (R. 25-26.)

The Tax Court held that the taxpayers were not permitted to use the method for computing the income tax provided by Section 107 of the Internal Revenue Code because the portion of the compensation received upon completion of the services was less than 95 percent of the total compensation. (R. 27.)

SUMMARY OF ARGUMENT

The taxpayers cannot avail themselves of the special method for computing tax liability provided by Section 107 of the Internal Revenue Code, because the portion of the compensation received on completion of the services was less than 95 percent of the total compensation. Congress has drawn the line with mathematical exactness and no interpretation, however liberal, could permit application of Section 107 in this case even though *almost* 95 percent was received on completion of the services.

This Court recently said in *Lindstrom v. Commissioner*, 149 F. 2d 344, 346, that the provisions of Section 107 are to be strictly construed.

There is no error of fact or law in the Tax Court's determination. The \$5,500 withdrawn from the trust account for expenses before 1940 is admittedly part of the total fee. The contingency that all or a portion of this amount might have had to be restored in the event that future expenses exceeded the balance in the trust account could not prevent the \$5,500 from being treated as partnership income immediately upon its receipt. The controlling principle of law was early recognized by this Court in *Burnet v. North American Oil Consolidated*, 50 F. 2d 752, affirmed, 286 U. S. 417, and the present case is no exception.

The accumulated interest of \$1,168.86 which the clients permitted the partnership to withdraw before 1940 was paid as compensation and was not a gratuity. Factually, the accumulated interest was treated identically with the withdrawals totaling \$5,500, which admittedly were fees. There are no facts in the record which lend support to the contention that the clients made a gift of the accumulated interest.

The Tax Court's determination from the record that the controverted items were compensation when they were received is conclusive. By reason of the prior receipt of compensation totaling \$6,668.86 the partnership received less than 35 percent of the total compensation for these services in 1940 and Section 107 does not apply.

ARGUMENT

The special method for computing tax liability provided by Section 107, Internal Revenue Code, is not available here

Section 107 of the Internal Revenue Code, *supra*, as applicable in 1940, provides for a special method of computing the income tax with respect to compensation for services rendered for a period of five years or more. Clause (b) of Section 107 limits that special method to cases where not less than 95 percent ² of the compensation is paid on completion of the services. The issue in this case is whether the Tax Court erred in holding that the portion of the compensation paid in 1940 was less than 95 percent of the total compensation and, therefore, that Section 107 was not available to the taxpayers.

This Court recently had occasion to consider the interpretative policy underlying Section 107 in *Lindstrom v. Commissioner*, 149 F. 2d 344, involving an attempt to tack services rendered by a law partnership onto services previously rendered individually by one of the partners. This Court said (p. 346):

The legislative provision here considered (Section 107) constitutes an exception to the general rules governing the taxation of income. Its obvious purpose was to alleviate tax hardships resting on long-term workers who receive compensation upon the completion of their services, but we do not believe that the relief afforded by this section covers the situation presented here. The taxpayer claiming its benefits must bring himself within the letter of the Congressional grant. * * *

The will of Congress has been plainly expressed

² The line is now fixed at 80 percent by Section 107, as amended by Section 139(a), Revenue Act of 1942, c. 619, 56 Stat. 798 (26 U. S. C. 1940 ed., Supp. IV, Sec. 107).

in language that does not permit or require a strained or unnatural interpretation. The words of the statute may not be extended or distorted beyond their plain, popular meaning. [Citations omitted.]

The Supreme Court points out that provisions granting special tax exemptions are to be strictly construed. [Citations omitted.]

In the face of this clear expression, the taxpayer asserts, without referring to the *Lindstrom* case, that Section 107 should be given a "liberal" interpretation which would make its benefits available in a case where the payment on completion of the services is less than the 95 percent or more required by the statute. (Br. 16-20, 27-29, 39-41). We submit that no process of interpretation, however liberal, could construe "not less than 95 per centum" as meaning "not less than 94.8 per centum", or "almost 95 per centum". Congress has drawn the line with mathematical exactness and there is no room for interpretation. The statutory language is plain and unambiguous, and, therefore, *Slough v. Commissioner*, 147 F. 2d 836 (C. C. A. 6th), and the other cases cited by the taxpayers are of no aid to them. (See Br. 17-20.) Contrary to the taxpayers' contention (Br. 39-40), the taxpayers are not subjected to any penalty by reason of their inability to avail themselves of the special method for computing the tax afforded by Section 107. They are merely placed on the same footing with all other income taxpayers whose income is taxed as it is received.

The taxpayers allege (R. 32, Br. 14) that the Tax Court erred "in finding as a fact or deciding as a matter of law" that the partnership of Hanna and Morton received a total of \$6,668.86 as fees for services before 1940 (R.

24-26, 27). We fail to discern any error of fact or law in the Tax Court's determination.

The Tax Court's opinion proceeds on the assumption that the partnership's treatment of the \$27,500 received in 1932 as a special trust account was conclusive for tax purposes and that the \$27,500 was not includible in the partnership's 1932 income.³ See, however, *Commissioner v. Alamitos Land Co.*, 112 F. 2d 648, 651 (C. C. A. 9th), certiorari denied, 311 U. S. 679. Presumably, the Tax Court considered the circumstances surrounding the \$27,500 payment to be such that the fund was not immediately and unrestrictedly available for general partnership use. That was not the case, however, as the taxpayer's brief recognizes (pp. 25-26), with respect to the amounts, totaling \$5,500, which were withdrawn from the special account from time to time in 1932, 1933 and 1936. These amounts were withdrawn for general partnership use with the client's permission and they were treated as fees on the partnership's records. (R. 49-52, 63-67, 73, 96, 109-110). The partners reported these items as compensation in their income tax returns for the years in which they were received. (R. 25.)

Now, although the taxpayers concede (Br. 5) "that the advances of \$5,500.00 constituted a part of the total fee", they contend that the items aggregating this sum should not be treated as income or compensation until 1940. The only reason advanced for delaying taxation of these items beyond the years in which they were received is that the partnership, having undertaken to pay all of the expenses of the litigation, would have to make up any deficits in the

³ The portion of the taxpayers' brief (pp. 21-26) which is devoted to a discussion of the taxable status of the \$27,500 payment is not in point, since the question is not now in issue.

expense account in the event that future expenses exceeded the balance remaining in that account. This contingency, it is asserted, requires that the \$5,500 be treated as an "advance" or a "loan" until 1940, when the expenses of the litigation were finally determined. (Pet. Br. 27-29.)

The record shows that the contingency of which the taxpayers make so much was indeed very remote. Mr. Morton, the partner who arranged for the \$27,500 payment, testified that he had estimated that the expenses of the litigation (R. 63) "might be \$20,000—it might be \$10,000, \$20,000 or \$30,000." Thus, the \$27,500 set aside for expenses approached the highest figure estimated. Mr. Hanna also testified (R. 63-64) as to the \$3,500 which was almost immediately taken and used by the firm that (R. 64):

We did not know that we would have to have that for expenses *except for legal fees for ourselves.*
[Italics supplied.]

It is clear that both the attorneys and the clients recognized that \$27,500 was more than enough to cover the anticipated expenses and that it was almost a certainty, even at that early date, that at least \$3,500 could be withdrawn immediately by the attorneys as fees. As the work progressed, the future expenses could, no doubt, be forecast with greater accuracy, and the withdrawals of \$1,000 in each of the years 1933 and 1936 were conservative indeed, considering that the total cost paid from 1932 through 1940 was only \$14,230.45. (R. 110.) It must also be observed that the clients did not hold the attorneys strictly to their agreement to pay all of the expenses out of the \$27,500, because at the termination of the litigation the clients reimbursed the attorneys to the

extent of \$2,429.35 of costs which had been expended from the \$27,500 fund. (R. 25.) It is reasonable to conclude that the partners never really expected to have to pay out for expenses the amounts which they had received as fees.

This Court early recognized the general principle which requires that, in spite of the contingency, the various amounts withdrawn from the trust account be treated as taxable income for the respective years in which they were made available for general partnership use. In the leading case of *Burnet v. North American Oil Consolidated*, 50 F. 2d 752, this Court rejected the taxpayer's contention that income actually received in 1917 was not taxable until 1922 because the right to retain the income was in litigation until the latter year. In affirming the judgment of this Court, the Supreme Court said (*North American Oil v. Burnet*, 286 U. S. 417, 424):

If a taxpayer receives earnings under a claim of right and without restriction as to its disposition, he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent. * * *

A similar effort to exclude from gross income a portion of the premiums earned by an insurance agent which might have to be restored in future years was later rejected by this Court and also affirmed by the Supreme Court. *Brown v. Commissioner*, 63 F. 2d 66 (C. C. A. 9th), affirmed, 291 U. S. 193. The principle declared in *North American Oil v. Burnet*, *supra*, has been uniformly

followed in a long line of cases and *Knight Newspapers v. Commissioner*, 143 F. 2d 1007 (C. C. A. 6th), cited and quoted by the taxpayers (Br. 27-29), does not purport to depart therefrom. See annotation on the *Knight Newspapers* case at 154 A. L. R. 1276. To adopt the method of reporting income contended for by the taxpayers would require a departure from the fundamental rule that income is determined and taxed on an annual and not a transactional basis. *Security Mills Co. v. Commissioner*, 321 U. S. 281; *Burnet v. Sanford & Brooks Co.*, 282 U. S. 359. The withdrawals totaling \$5,500 were immediately and unrestrictedly available to the partners and they made no mistake in reporting the several items as income for the years in which they were received, in spite of the remote contingency that future expenses might exceed the balance remaining in the expense account.

There is also no merit in the contention (Pet. Br. 29-39) that the accumulated interest of \$1,168.86 which the clients permitted the partnership to withdraw for its own use before 1940 was a gratuity rather than compensation for services. The interest belonged to the clients initially and it was withdrawn for partnership use only after the permission of the clients was obtained. (R. 72.) Mr. Morton testified (R. 71-72) and the Tax Court found (R. 24) that the interest would have had to be returned, in the same manner as the \$5,500 which the taxpayers admit to have been fees (Br. 5), if it ever became necessary to complete the payment of expenses. The interest so received was currently reported as income by the partners. (R. 24.) The facts all support treatment of this

item as compensation and they permit no inferences to the contrary.

In the face of these facts, and the other evidence of record pertaining to the circumstances under which the partnership was permitted to withdraw the accumulated interest (R. 67-77), the taxpayers contend that the interest was received by the partnership as a gratuity and not as compensation for services. There is absolutely no support in the record for this contention. Reliance is sought to be placed upon the provisions of the contract pertaining to the manner in which the partners were to be compensated for their services (R. 53-54) but those provisions do not negative the Tax Court's finding, because there is nothing to prevent the payment of additional compensation. In any event, the source of the Tax Court's finding could not be limited to the contract alone since the parties failed to adhere to the contract right from the start and it did not express their real agreement. (R. 54, 64, 85-87, 92, 94-95, 101-107.) If the contract were to be taken literally, the \$27,500 would have had to be treated as compensation for 1932, in which case the final payment in 1940 would have been far less than the 95 per cent required by Section 107.

It was for the Tax Court to determine as a matter of fact whether the interest was received as compensation or as a gratuity and, also, whether the \$5,500 was received as compensation or as a loan. *Commissioner v. Smith*, 324 U. S. 177, rehearing denied, September 9, 1945 (1945 C. C. H., par. 9253). On the record before it, the Tax Court could find only, as it did, that these amounts were received as compensation for services. That finding is

conclusive.⁴ *Commissioner v. Smith*, *supra*; *Dobson v. Commissioner*, 320 U. S. 489, rehearing denied, 321 U. S. 231. See also *Trust u/w of Bingham v. Commissioner*, decided by the Supreme Court, June 4, 1945 (1945 C. C. H. par. 9327); *Choate v. Commissioner*, 324 U. S. 1; *Commissioner v. Court Holding Co.*, 324 U. S. 331. By reason of the prior receipt of compensation totaling \$6,668.86 the partnership received less than 95 percent of the total compensation for these services in 1940 and Section 107 does not apply.

⁴ Although *Bogardus v. Commissioner*, 302 U. S. 34, cited by the taxpayers (Br. 15, 34), was a case in which the Supreme Court reversed a determination of the Board of Tax Appeals that a particular item was taxable as compensation and not a gift, that case was specifically referred to by the Supreme Court as one of those in which the courts, including the Supreme Court, had "not paid the scrupulous deference to the tax laws' admonitions of finality which they have to similar provisions in statutes relating to other tribunals" than the Tax Court. *Dobson v. Commissioner*, 320 U. S. 489, 494 fn. 8, 498 fn. 22.

CONCLUSION

The decisions of the Tax Court are correct and should be affirmed.

Respectfully submitted.

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SEPTEMBER 1945.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

No. 11070.

BYRON C. HANNA,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

No. 11071.

DAISY MAY HANNA,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONERS' REPLY BRIEF.

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PETITIONERS' REPLY BRIEF.

Scope of Reply.

Respondent's Brief endeavors to classify the amounts aggregating \$1,168.86, received by Hanna and Morton as interest prior to 1940, in the same category as other items aggregating \$5,500, received by Hanna and Morton prior to 1940, and to characterize all of these items, including interest, as compensation "received for personal services" rendered in the employment mentioned in the Opinion of The Tax Court.

In this manner respondent seeks to avoid the definite distinction between the money received as interest and the other items mentioned.

We earnestly believe, as contended in our Opening Brief, that the other items, aggregating \$5,500, received by Hanna and Morton prior to 1940, did not constitute compensation "received for personal services rendered" prior to 1940.

However, for the purpose of emphasizing the distinguishing characteristics of the money received as interest, and to clarify the issues, we will direct attention in this Reply Brief solely to the question as to whether that amount constituted part of the compensation "received for personal services rendered" in the employment mentioned.

We do this in the confident belief that upon the record in this case the conclusion is inescapable that this money received as interest did not constitute any part of such compensation.

If that conclusion be accepted, it necessarily follows as a matter of mathematical computation that Petitioners are entitled to avail themselves of the benefit of Section 107, I. R. C.

Respondent proceeds by a series of erroneous premises and deductions to elaborate an argument supporting the contention that the amount received as interest constituted compensation "received for personal services rendered, etc."

Before discussing this final and determinative contention, we note the errors by which respondent approaches it, as follows:

(1) Respondent states:

“* * * the taxpayer asserts * * * that Section 107 should be given a ‘liberal’ interpretation which would make its benefits available in a case where the payment on completion of the services is less than the 95% or more required by the statute.” (Resp. Br. 9.)

This statement involves two errors:

1st. It is not so much Petitioners’ contention that Section 107 should be given a liberal interpretation as that it should be liberally administered and applied.

2nd. Petitioners have not contended at any time that it should be given such an interpretation liberally or otherwise as would “make its benefits available in a case where the payment on completion of the services is less than the 95% or more required by the statute.”

The question at issue in the present case is whether the “payment on completion of the services” was “less than the 95% or more required by the statute.”

(2) Respondent asserts:

“* * * the taxpayers are not subjected to any penalty by reason of their inability to avail themselves of the special method for computing the tax afforded by Section 107. They are merely placed on the same footing with all other income tax payers whose income is taxed as it is received.” (Resp. Br. 9.)

This is a specious and disarming statement. The taxpayers are not "placed on the same footing with all other income tax payers whose income is taxed as it is received." The vast majority of taxpayers receive their income currently for services rendered. It was the recognition of the fact that taxpayers in situations similar to that presented in the present record are penalized and are treated unfairly, that induced Congress to adopt Section 107, and later, in 1942, to extend its operation very substantially.

(3) Respondent argues that:

"Both the attorneys and the clients recognized that \$27,500 was more than enough to cover the anticipated expenses" and that the estimated costs were revealed as excessive in 1933 and 1936 "considering that the total cost paid from 1932 through 1940 was only \$14,230.45." (Resp. Br. 11.)

The fact is clearly demonstrated by the record that at the time the employment was accepted by Hanna and Morton, it was entirely impossible to estimate the costs with any degree of certainty or accuracy, and the possible amount of the costs remained equally uncertain until the Supreme Court denied a petition for *certiorari* on January 2, 1940 (304 U. S. 624, 84 L. Ed. 521). Until that time there could be no certainty that the case would not be reversed and remanded for another trial, in which event the costs might greatly have exceeded \$27,500. (See testimony of Morton, R. 44, 55-6, 63, and of Hanna, R. 106.)

(4) Respondent asserts:

"It must also be observed that the clients did not hold the attorneys strictly to their agreement to pay all of the expenses out of the \$27,500, because at the termination of the litigation the clients reim-

bursed the attorneys to the extent of \$2,429.35 of costs which had been expended from the \$27,500 fund." (Resp. Br. 11 and 12.)

In support of this statement, Respondent refers to the portion of the decision of The Tax Court, appearing at page 25 of the record, as follows:

"Hanna and Morton successfully tried the case for the Lazards, and on January 19, 1940 the Bank paid \$746,354.95 in satisfaction of the judgment.

From this amount Hanna and Morton received on that day \$114,018.19, consisting of the contingent fee in the amount of \$111,588.84 and \$2,429.35 reimbursement of costs expended from the \$27,500 fund."

Respondent overlooks the fact that the item of \$2,429.35 represented taxable costs collected from the bank and which were included in the total amount of the judgment. [R. 97.]

It is therefore clear that there is no foundation for the statement that the clients did not hold the attorneys strictly to their agreement, or for the statement that at the termination of the litigation the clients reimbursed the attorneys to the extent of \$2,429.35 of costs which had been expended from the \$27,500 fund.

(5) Respondent asserts:

"Mr. Morton testified [R. 71-72] and the Tax Court found [R. 24] that the interest would have had to be returned, in the same manner as the \$5,500 which the taxpayers admit to have been fees (Br. 5), if it ever became necessary to complete the payment of expenses." (Resp. Br. 13.)

The mere fact that the money received as interest was subject to the same conditional obligation of restitution as the \$5,500 withdrawn from the trust funds, and which later in 1940 became fees, does not indicate in any manner that the characters of the two types of items were identical.

There is no logical basis for an inference that obligations to be performed in the same manner, arose in the same manner or were founded on the same consideration.

(6) Respondent asserts:

“The interest so received was currently reported as income by the partners. [R. 24.]” (Resp. Br. 13.)

In support of this statement, Respondent refers to that portion of the decision of The Tax Court appearing at page 24 of the Record, and reading as follows:

“The interest so received was currently reported as income by Hanna and Morton.”

It is true that the interest received was currently reported as income by Hanna and Morton, but this overlooks the important and specific fact that it was not reported as compensation received, but was reported as interest received. [See testimony of Morton, R. 73-4, and Exhibits C, D and E, R. 74-6.]

Immediately following the statement last above quoted from Respondent's Brief, Respondent makes the further statement: “The facts all support treatment of this item as compensation and they permit no inferences to the contrary.” (Resp. Br., 13-14.) The complete lack of justification for this statement is disclosed by the specific facts above-mentioned.

The Sum of \$1,168.86 Interest on the Savings Accounts Did Not Constitute Compensation "Received for Personal Services."

It is established conclusively by the record in this case that the items aggregating \$1,168.86, referred to as "interest", were actually received by Hanna and Morton as interest on money deposited in the savings accounts. These items were withdrawn by Hanna and Morton from the banks in which these accounts were carried. They were withdrawn as interest and were not paid by the clients to Hanna and Morton [R. 69-70].

The findings of the Tax Court reflect these facts. Thus, the Tax Court found:

"A total of \$1,168.86 in interest accrued on the savings accounts. During the years 1934 to 1936 Hanna and Morton withdrew this interest for their own unrestricted use having been told by Lang that they could keep it. They were to return it if it ever became necessary to complete the payment of expenses, their obligation in any event being to meet all expenses over the \$27,500." [R. 24.]

As hereinbefore set forth, the money so received was currently reported as "interest" income by Hanna and Morton.

There is no question but that the money was received by Hanna and Morton as "interest." The clients granted Hanna and Morton the right to retain and use the interest, subject to the condition that Hanna and Morton would put it back if necessary to complete the payment of expenses [R. 71, 72]. To be precise, the most that respondent can claim is that this grant or authorization to so use this money received as interest constituted additional compensa-

tion to Hanna and Morton for services rendered in the employment mentioned.

There is not a scintilla of evidence in the record to support this contention, or from which a legitimate inference may be drawn to support this contention. Therefore, the further finding of the Tax Court, "This interest was a fee for services when it was so withdrawn by Hanna and Morton" [R. 24-25] is wholly unsupported by the evidence.

The record discloses that during the pendency of the principal case mentioned, Hanna and Morton were employed by the same clients, and also by some of the same clients, under separate and distinct employments to handle other litigation. Thus, they represented certain of the same clients in a stockholders derivative suit on behalf of the Anglo California National Bank of San Francisco against Herbert Fleishhacker [R. 78-79]. They also handled another case, known as "the Market Street case," representing the same clients who were involved in the principal case mentioned [R. 82-83].

From time to time, with the consent of the clients, money was taken temporarily from the trust fund in the principal case to be used for expenses in this other litigation [R. 94.] Therefore, assuming that the granting to Hanna and Morton of the right to make use of the money received as interest constituted compensation to Hanna and Morton, there is no basis for any inference that the compensation was for services rendered in the principal case. In fact, the Tax Court does not find that the interest was a fee for services rendered in the principal case, although the Tax Court does treat it as such in its opinion.

We mention these facts not only for the purpose of showing that there is no evidence to support any finding

that the grant of the right to use this money received as interest constituted compensation to Hanna and Morton for services rendered, but also to show that there is no evidence to support a finding that if it did constitute compensation for services rendered, the compensation was for services rendered in the principal employment mentioned.

The most that can be said for the record is that it shows the following facts: Hanna and Morton were rendering services for the clients under at least three separate and distinct employments; money taken from the trust fund was temporarily used with the consent of the clients, in the payment of expenses in litigation other than the principal case, in connection with which the trust was created; interest accrued on the trust funds; Hanna and Morton withdrew this interest; the clients granted Hanna and Morton the right to use the interest, subject to the obligation to return it if necessary for the payment of costs in the principal case.

At this point, and from this point on, the record is silent. There is nothing to show that the grant of the right to use the interest money was intended by the clients or by Hanna and Morton as compensation for services rendered in any of these matters; or if so, that it was intended as compensation for services rendered in the principal case. There are, however, in the record definite indications that the granting of the right to Hanna and Morton to make use of the interest money did not constitute additional compensation in the principal case. The amount of money involved in that case, the voluminous legal services contemplated in the employment in that case, the amount of the fee which the clients had agreed to pay in the event of success in that case, the fact that the compensation of the attorneys in that case was definitely fixed by a written con-

tract of employment, all constitute circumstances which refute any suggestion that the granting of the right to make use of the sum of \$1,168.86, received by Hanna and Morton as interest, was additional compensation for services to be rendered in the case.

Moreover, the fact that the total fee in the principal case, exclusive of this amount of \$1,168.86, amounted to a sum in excess of \$120,000, characterizes any such suggestion as an absurdity. In view of all the circumstances surrounding the clients and Hanna and Morton in connection with this litigation, the amount involved in the litigation, and the nature and extent of the services required, if any additional compensation had been paid by the clients to Hanna and Morton, it is reasonable to expect that such additional compensation would have been comparatively substantial.

Measured against this background, the amount of \$1,168.86 is so trifling as to stamp as inconceivable any idea that it constituted additional compensation for services rendered in the principal employment.

Additionally, it should be observed that at the time each of the amounts aggregating \$5,500 was withdrawn by Hanna and Morton, with the consent of the clients, from the trust fund prior to 1940, entries were made in the books of Hanna and Morton indicating that the amounts so withdrawn were in the nature of conditional payments on account of fees [Ex. 5, R. 49 and 50; Ex. 6, R. 50; Ex. 7, R. 50-51; Ex. 8, R. 51-2; Ex. 9, R. 52].

There is no evidence that the amounts received as interest, aggregating \$1,168.86, were ever so treated or characterized on the books of Hanna and Morton. In fact, there is no evidence that such amounts were ever credited or treated by Hanna and Morton as payments on account of compensation for services rendered in the principal case, or otherwise.

Conclusion.

For the reasons set forth in our Opening Brief, as well as in this Brief, the decision of The Tax Court should be reversed.

Respectfully submitted,

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Attorneys for Petitioners.





